TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 198.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

SMITH, HUGGINS AND COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED FEBRUARY 5, 1906.

(20,084.)

(20,084.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 198.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

SMITH, HUGGINS AND COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE

INDEX.

	Original.	Print.
Caption	*a*	1
Writ of error	*b*	1
Acknowledgment of service of copy of writ of error	*d*	2
Citation and service	*e*	2
Petition for writ of error	*g*	3
Order allowing writ of error	*k*	6
Assignment of errors	*l*	6
Bond on writ of error	*o*	8
Order allowing writ of error, &c.	*q*	9
Transcript from chancery court	1	10
Bond for costs	1	10
Bill of complaint	1	10
Subpœna to Louisville and Nashville Railroad Company	7	13
Officer's return	8	13
Subpœna to Southern Railway Company	8	14
Officer's return	9	14
Order granting time to answer	10	14
Answer of the Louisville and Nashville Railroad Company	11	15
Answer of the Southern Railway Company	14	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 16, 1906.

	Original.	Print.
Exhibit 1—Shipping order	19	19
Order allowing time for defense	20	23
Charter of incorporation of Smith, Huggins & Co.	20	23
Notice to take depositions	26	26
Notice to take depositions	27	26
Deposition of J. B. Huff (omitted in printing)	28	—
Deposition of G. W. Long (" ")	33	—
Exhibit A—Statement as to corn (" ")	42	—
Deposition of J. L. Huggins (" ")	44	—
Agreement as to depositions (" ")	49	—
Notice to take depositions (" ")	50	—
Deposition of M. L. Beeler (" ")	51	—
Exhibit A—Letter, Davis & Co. to Smith, Huggins & Co., September 5, 1902 (omitted in printing)	59	—
B—Letter, Davis & Co. to Smith, Huggins & Co., September 25, 1902 (omitted in printing)	59	—
C—Letter, Smith, Huggins & Co. to Davis & Co., September 26, 1902 (omitted in printing)	60	—
Deposition of W. V. Moore (omitted in printing)	61	—
Exhibit A—Freight bill (" ")	84	—
B—Freight bill (" ")	85	—
C—Freight bill (" ")	86	—
D—Freight bill (" ")	87	—
E—Freight bill (" ")	88	—
F—Freight bill (" ")	89	—
G—Freight bill (" ")	90	—
H—Freight bill (" ")	91	—
I—Freight bill (" ")	92	—
J—Freight bill (" ")	93	—
K—Freight bill (" ")	94	—
L—Freight bill (" ")	95	—
Agreement as to interrogatories (" ")	96	—
Interrogatories to F. P. Pelter (" ")	96	—
Deposition of F. P. Pelter (" ")	101	—
Exhibit A—Freight bill (" ")	113	—
B—Statement of billing (" ")	114	—
C—Statement of shipping, &c. (omitted in printing)	115	—
D—Receipt (omitted in printing)	116	—
Agreement as to interrogatories (" ")	117	—
Interrogatories to J. Allen Durham (" ")	117	—
Deposition of J. Allen Durham (" ")	121	—
Exhibit A—Car record book (" ")	125	—
Agreement as to depositions (" ")	126	—
Interrogatories to W. J. Dobbs (" ")	126	—
Deposition of W. J. Dobbs (" ")	131	—
Agreement as to depositions, &c	139	27
Interrogatories to B. M. Starks	140	28
Deposition of B. M. Starks	142	29
Exhibit A—Letter, Starks to Richy, November 13, 1902	145	30
Agreement as to interrogatories, &c	146	31
Interrogatories to J. R. Wheeler	146	31
Deposition of J. R. Wheeler	148	32

	Original.	Print.
Agreement as to interrogatories, &c ...(omitted in printing)..	153	—
Interrogatories to C. P. Black. ... ... (" ")..	153	—
Deposition of C. P. Black .. ..(" ")..	155	—
Agreement as to interrogatories.....(" ")..	159	—
Interrogatories to C. R. Trousdale ...(" ")..	160	—
Interrogatories to A. B. Cecil.....(" ")..	161	—
Deposition of C. R. Trousdale.....(" ")..	163	—
Deposition of J. A. McDougal..... (" ")..	168	—
Exhibit A—Map of a portion of Birmingham, Ala (omitted in printing).	172a	—
Agreement as to proceedings	173	35
Agreement as to interrogatories.... ...(omitted in printing)..	174	—
Interrogatories to A. W. Richardson...(" ")..	176	—
Deposition of A. W. Richardson.....(" ")..	178	—
Decree and reference.....	181	35
Agreement as to interrogatories.....	184	37
Interrogatories to E. F. Stollenwerck..... ...	187	38
Deposition of E. F. Stollenwerck.....	191	40
Exceptions in behalf of Southern Railway Company....	197	43
Decree confirming report of master.	199	44
Report of master	200	44
Allowance of appeal.	206	48
Appeal bond.....	207	48
Bill of costs.	208	49
Clerk's certificate.....	209	50
Index to transcript.....(omitted in printing)..	210	—
Cost bond	213	50
Writ of error	214	50
Proceedings in court of chancery appeals.	215	51
Decree	217	52
Opinion.....	220	53
Petition for rehearing, &c.....	232	60
Exhibit A—Statement as to testimony.	253	74
Response to petition for rehearing, &c....	254	75
Assignment of errors.....	258	77
Decree, November 20, 1905	261	79
Decree, November 25, 1905.....	263	80
Order vacating decree of November 20, 1905.....	263	80
Order denying petition for rehearing.....	264	80
Petition for rehearing.....	265	81
Clerk's certificate to transcript of record.....	267	82
Assignment of errors and designation by plaintiff in error of parts of record to be omitted in printing.	268	82

a *Transcript.*

From Supreme Court of Tennessee, at Knoxville.

SMITH-HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY and LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Solicitors:
C. T. Rankin for Complainant.
J. A. Susong for Defendant, Southern Ry. Co.
Cornick, Wright & Frantz for L. & N. R. R. Co.
Sureties:
J. A. Susong.
J. B. Huff.
Filed — day of —— 1906.

b CIRCUIT COURT OF THE UNITED STATES,
Eastern District of Tennessee, Northern Division, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Tennessee, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Smith, Huggins & Company *vs.* Southern Ry. Co. *et al.* wherein the Louisville & Nashville Railroad Company, a corporation under the laws of Kentucky was a party in interest & to said cause and wherein was drawn in controversy certain Federal questions under the United States Statutes growing out of an authority exercised by said State and the decision was in favor of its validity and against the contention of said Louisville & Nashville R'd Co., a manifest error hath happened, to the great damage of the said Louisville and Nashville Railroad Company as by its complaint appears.

We being willing that that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 3rd day of December, in the year of our Lord one thousand nine hundred and five.

[The Seal of the Circuit Court, District of East Tenn.]

D. L. SNODGRASS, *Clerk*,
By W. L. EDINGTON,
Dep. Clerk, United States Circuit Court,
Eastern District of Tennessee.

Allowed by
W. D. BEARD,
Chief Justice Supreme Court of Tennessee.

c [Endorsed:] No. — In the United States Circuit Court at Knoxville. Smith, Huggins & Company Against Southern Railway Company *et al.* Writ of Error. United States Supreme Court. Filed Dec. 3, 1905 and copy of same lodged in my office same date. S. E. Cleage Clerk. By J. N. Mitchell D. C.

d KNOXVILLE, TENN., *Dec. 15th,* 1905.

C. T. Rankin, Esq., Jefferson City, Tenn.

DEAR SIR: Enclosed herewith, I hand you copy of petition for writ of error in the case of L. & N. Ry. Co. plaintiff in error *vs.* Smith-Huggins & Co.

Kindly acknowledge receipt, and oblige,

Yours truly
S. E. CLEAGE, *Clerk*,
By J. N. MITCHELL, *D. C.*

(Enc.)

JNM/IDM.

I acknowledge the receipt of above named enclosure
Dec. 16 1905

C. T. RANKIN.

e Filed Dec. 3, 1905 S. E. Cleage Clerk, By J. N. Mitchell D. C.

UNITED STATES OF AMERICA, *ss:*

To Smith, Huggins & Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee wherein the Louisville & Nashville Railroad Company is Plaintiff in error and you are Defendant in error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in error, as in the said writ of error

mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of December in the year of our Lord one thousand nine hundred and five.

W. D. BEARD,
Chief Justice of the Supreme Court of State of Tenn.

Copy of within citation received this 3rd day of December, A. D. 1905 at Jefferson City, Tennessee.

C. T. RANKIN,
Att'y for Smith, Huggins & Co.

f [Endorsed:] Citation. Smith, Huggins & Co. *vs.* So. Ry. Co *et al.* Filed Dec. 3, 1905.

g UNITED STATES OF AMERICA, *State of Tennessee:*

To the Honorable William D. Beard, Chief Justice of the Supreme Court of the State of Tennessee:

The petition of the Louisville & Nashville Railroad Company respectfully shows that on the 25th. day of November A. D. 1905 the Supreme Court of the State of Tennessee rendered a final decree against your petitioner in a certain cause wherein Smith Huggins & Company was complainant and your Petitioner was defendant for six hundred and twenty six and eight four hundredths ($626.84) dollars and costs and awarded execution thereon as will appear by reference to the record and proceedings in said cause and that said Court is the highest Court of the said State in which a decree in said suit could be had.

And your Petitioner claims the right to remove said decree to the Supreme Court of the United States by writ of error under Section 709 of the revised Statute- of the United States on account of the following facts, to-wit:

Upon the 16th. day of October 1902 this bill was filed in the Chancery Court of Jefferson County, Tennessee, alleging:

"That the defendants, Southern Railway Company and the Louisville & Nashville Railroad Company at the time the foregoing several contracts were made were common carriers of goods and chattels for hire, the said Southern Railway Company being the receiving and the initial carrier, and the one with which said contracts were made at the dates and places above mentioned—, the defendant Louisville & Nashville Railroad Company being the connecting and ultimate carrier, and as such carrier was bound by said contracts, etc."

The proof in the case disclosed the fact that the suit was for damages to a shipment of twelve cars of corn shipped from various points in East Tennessee by Smith Huggins & Company on local Southern Railway bills of lading and consigned to themselves
h at Birmingham, Alabama, the entire haul being over the line of the Southern Railway Company and for delivery in

its depot and on the delivery tracks of the Southern Railway Company in Birmingham; that the corn arrived in Birmingham over the Southern Railway tracks in a damaged condition on account of its having been gathered before maturity and upon its arrival in Birmingham it was tendered by the Southern Railway to the Louisville & Nashville Railroad Company to be "transferred" or "Switched" across the yards of the Louisville & Nashville Railroad Company in Birmingham, a distance of about three hundred yards to the ware house of the Alabama Mill and Elevator Company situated upon the private side tracks of the said Louisville & Nashville Railroad Company; that the Louisville & Nashville Railroad Company refused to transfer or "switch" these cars across its yards to the ware house of the Alabama Mill and Elevator Company because of the congested condition of its yards in Birmingham growing out of the unprecedented traffic originating upon its own line at that time; that an embargo had been placed by the Louisville & Nashville Railroad Company on the 14th day of November, 1902 against all lines entering Birmingham because of the congested condition of its yards with inbound business consigned to various consignees on the various tracks to such an extent that the inbound business could not be unloaded as fast as it was received because it was absolutely impossible to handle with dispatch its own business, much less the business of other connecting railroads entering Birmingham; that the Southern Railway Company and the Louisville & Nashville Railroad Company had depots side by side in the City of Birmingham; that the terminals and equipment of the Louisville & Nashville Railroad Company for handling freight were sufficient under ordinary circumstances and conditions but on account of this unprecedented traffic it was physically unable to handle these cars of corn or these interstate shipments for "switching" purposes when tendered to it by the Southern Railway Company.

Petitioner relied upon Section Three of the Act of Congress of Feb. 4th, 1887, governing Interstate Commerce as grounds for its refusal to "switch" these cars when tendered to it by the Southern Railway Company, the Act not being intended to hold a carrier liable for refusing traffic from other roads to the exclusion of freight originating upon its own line or to the impairment of the facilities for handling freight originating upon its own rails.

The section relied on is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act, shall, according to their respective powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers

and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

But this act shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

On the hearing in the Chancery Court of Jefferson County Tennessee, a decree was rendered in favor of this Petitioner but subsequently the Complainant appealed the case to the Supreme Court of Tennessee by writ of error and said Supreme Court of Tennessee referred said cause to the Court of Chancery Appeals and that Court decided the issue against this Petitioner and rendered judgment against this petitioner for the sum of six hundred twenty six and eighty four hundredths ($626.84) dollars to-gether with a portion of the costs in the lower Court and the cost of the appeal, which said judgment was affirmed by the Supreme Court and the judgment of the Court of Chancery Appeals was adopted as its judgment and a decree entered accordingly.

Petitioner shows that the issues raised present a federal question in said case, namely:

First. Whether the shipment of these loaded cars from one State to another is regulated and controlled by the Interstate Commerce Act of February 4th, 1887 (Supplement to Revised Statutes Vol. 1 page 529) and whether the decision of the Supreme Court of Tennessee is in contravention of said Act of Congress and deprives Petitioner of certain rights and privileges that are given it by said interstate Commerce Act and whether said Act provided against and protects Petitioner from an invasion of such rights as were denied it by the said Court in this proceeding and whether the Act of Congress is constitutional and exclusive and abrogates all laws and decisions in conflict therewith.

Second. Whether Petitioner is required to turn over to competing railroads its private switch yards and terminals and to be held liable in damages to individual shippers for its refusal to do so and whether petitioner shall be liable in damages for its refusal to make a through routing with connecting roads as to interstate shipments and to receive the full loaded cars of *the* such Companies for the purpose of "switching" them across its yards to a private industry located thereon where the freight depot of this Petitioner and of the connecting road are side by side.

Third. Whether this petitioner should be held liable in damages on account of its alleged discrimination against shippers by preferring freights originating upon its own line and whether its refusal to "switch" these cars for other roads in its Birmingham yards until it had relieved the congestion of its own traffic constitute the form of discrimination provided against in the Act of Congress regulating Interstate Commerce.

Petitioner further shows that a federal question was made in said case as hereinbefore set — and that said judgment of said Supreme Court was repugnant to and in conflict with the laws of the United States and of the Act of Congress aforesaid and that said

judgment of said Supreme Court was contrary thereto and that a decision of said Federal question was necessary to the judgment rendered.

Wherefore this Petitioner presents herewith an exemplified transcript of the record of the Supreme Court of the State of Tennessee in said case and prays that writ of error to said Supreme Court be allowed; that citation be granted and signed; that the bond
k herewith presented be approved and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate as a supersedeas, and the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of the Supreme Court of Tennessee be reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By JAS. B. WRIGHT,
Its Att'y in Law & in Fact.
CORNICK, WRIGHT & FRANTZ,
JAS. G. JOHNSON,
Attorneys and of Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 3rd day of December, A. D. 1905, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of Twelve hundred Dollars ($1200.00). Dated this 3rd day of December, A. D. 1905.

W. D. BEARD,
Chief Justice, Supreme Court of the State of Tennessee.

Filed in my office this 3d day of December, A. D. 1905.

S. E. CLEAGE,
Clerk Supreme Court of State of Tennessee,
By J. N. MITCHELL,
Deputy Clerk.

l The Supreme Court of the State of Tennessee.

SOUTHERN RAILWAY COMPANY ET AL., Plaintiffs in Error,
v.
SMITH, HUGGINS & COMPANY, Defendants in Error.

Now comes the Louisville & Nashville Railroad Company, one of the Plaintiffs in error and respectfully submits that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of Tennessee in the above entitled matter there is manifest error in this, to-wit:

First. The Court erred in not giving full force and effect to the Act of Congress governing these interstate shipments and in not abrogating all statutes and decisions in conflict therewith, thereby depriving plaintiff in error of immunities and privileges guaranteed

to it by the Constitution of the United States and by the Acts of Congress.

Second. The Court erred in holding that it was a part of Plaintiff-in-error'- business to "switch" cars for other roads in its Birmingham yards because it is in contravention of the Act of Congress which expressly relieves it from such obligations.

Third. The Court erred in holding that the Louisville & Nashville Railroad Company had become a common carrier of the Southern Railway Company as to its Birmingham yards because it had previously "switched" cars for said Southern Railway Company over its private spur tracks, in that the rights of all parties were fixed and determined by the Interstate Commerce Act and the "previous course of dealing between the roads" would not alter or affect its rights under the Statute.

Fourth. The Court erred in holding that plaintiff in error
m did not have the right to discriminate in its switching service between freight arriving in Birmingham over its own lines and freight arriving over other lines and that it could not prefer its own business because it deemed it to its advantage to use its said tracks in its own special "switching" operations, it not being intended by the Act of Congress to require one carrier to receive traffic from a connecting line to the exclusion of that originating upon its own line.

Fifth. The Court erred in rendering judgment against the Louisville & Nashville Railroad Company for damage for its refusal to "switch" the cars in controversy for the following reasons to-wit:

(A) Because it involved the shipment of loaded cars from one State to another thereby becoming interstate commerce and as such regulated and controlled by the Inter State Commerce Act of Feb. 4th, 1887 (Supplement to revised Statute, Vol. 1, page 529) showing that the decision of the Supreme Court of Tennessee was in contravention of said Act of Congress and deprived it of certain rights and privileges that are given it by said Interstate Commerce Act and because said Act provided against and protects plaintiff in error from an invasion of such rights as it has been deprived of by the said Court in this proceeding, the Act of Congress being constitutional and exclusive and abrogating all laws and decisions in conflict therewith.

(B) Because the effect of said decision is to compel this plaintiff in error to turn over to competing railroads its private switch yards and terminals and to hold it liable in damages to individual shippers for its refusal to do so and because said decision holds plaintiff in error liable in damages for its refusal to make a through routing with the Southern Railway Company as to those interstate shipments and to receive the full loaded cars of the Southern Railway Company for the purpose of "switching" them across its yards to a private industry located thereon where the freight depot of
n this plaintiff in error and the Southern Railway Company are side by side.

(C) Because the decision holds this plaintiff in error liable in damages on account of its alleged discrimination against shippers

by preferring freights originating upon its own line and its refusal to "switch" cars for other roads in its Birmingham yards until it had relieved the congestion in its yards caused by handling its own cars which is not the form of discrimination provided against in the Act of Congress regulating Interstate Commerce.

(D) Because this decision is repugnant to the Constitution and laws of the United States as well as against a right specially set up and claimed under the National Constitution and laws, the effect of which is to compel it to delay the transportation of interstate Commerce originating on its own line in order to "switch" cars within its own switching limits for other roads thereby causing an unconstitutional hindrance and obstruction of interstate commerce and interfering with the performance of paramount duties to which it is subjected by the Constitution and laws of the United States.

CORNICK, WRIGHT & FRANTZ,
Attorneys for Plaintiff in Error.

o Know all men by these presents: That we, Lousiville & Nashville Railroad Company, as Principal, and Jas. B. Wright as surety, are held and firmly bound unto Smith, Huggins & Company a corporation, in the sum of twelve hundred Dollars ($1200.00) to be paid to the said obligee, its successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of December, 1905.

Whereas the above named plaintiff in error hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Tennessee.

Now Therefore the condition of this obligation is such that if the above named plaintiff in error shall prosecute the said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By JAS. B. WRIGHT, *Agent & Att'y, Principal.*
JAS. B. WRIGHT, *Surety.*

Signed, sealed and delivered in the presence of

J. H. FRANTZ.
JAMES G. JOHNSON.

STATE OF TENNESSEE, *County of Knox:*

On this the 3rd day of December, A. D. 1905 before me personally appeared Jas. B. Wright, agent and attorney for the Louis-
p ville & Nashville Railroad Company, to me known to be the person who executed the foregoing bond for the Louisville &

Nashville Railroad Company and acknowledged the same as his free act and deed.

[Seal T. G. McConnell, Notary Public, Knox County, Tenn.]

T. G. McCONNELL,
Notary Public.

STATE OF TENNESSEE, *County of Knox:*

On this the 3rd day of December, 1905, before me personally appeared Jas. B. Wright to me known to be the person described in and who executed the foregoing bond as surety and acknowledged the same as his free act and deed.

[Seal T. G. McConnell, Notary Public, Knox County, Tenn.]

T. G. McCONNELL,
Notary Public.

I hereby approve the foregoing bond and surety, this 3rd day of December, A. D. 1905.

W. D. BEARD,
Chief Justice Supreme Court of Tennessee.

9 The Supreme Court of the State of Tennessee.

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Enter this.

The above entitled matter coming on to be heard upon the petition of Appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee, in which said cause this Court was of the opinion that the Statutes and laws of Tennessee were not in conflict with the Act of Congress regulating Interstate Commerce, and that the Act of Congress did not control the shipments in controversy, and upon examination of said petition and the record in such matters, and desiring to give petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

W. D. BEARD,
Chief Justice of the Supreme Court of the State of Tennessee.

1 *Transcript for the Supreme Court.*

Transcript of the Record in the case of Smith, Huggins & Co. *vs.* Southern Railway Company and Louisville & Nashville Railroad Company in the Chancery Court at Danridge, being cause No. 1622 on the rule docket of said Court

Bond for Prosecution.

Oct. 16, 1903, prosecution bond, filed as follows:—

I acknowledge myself as security for the costs of this suit.
J. B. HUFF.

Original Bill.

Oct. 17, 1903, bill filed as follows:—

To the Honorable Hal H. Haynes, chancellor, holding the chancery court at Danridge, Tenn., for the county of Jefferson:

The bill of complaint of Smith, Huggins & Company a corporation duly organized and existing under and by virtue of the Laws of Tennessee with its principal place of business at Jefferson City, Jefferson County, Tennessee against Southern Railway a
2 foreign Corporation with offices and agents in Jefferson County, Tenn., and doing business therein and Louisville & Nashville Railroad Company, a foreign Corporation with offices and agents in Maury County, Tenn., and doing business therein, Defendants.

The Complainant would most respectfully show unto the Honorable Court:—

I.

(1) That Complainant Corporation in the fall of 1902 was principally engaged in buying and shipping grain, principally corn and on Nov. 12, 1902 the Complainant delivered to the Defdt. Southern Railway Co. in the town of Jefferson City Tenn., one Car of Ear Corn worth $300.00 on a Contract that Defendant would deliver said Corn to Complt. or its order in the City of Birmingham, Ala., in good order, and within a reasonable time, the Defendant for valuable consideration contracted to do so in a reasonable time.

(2) Complt. further states that on Nov. 12, 1902, it delivered to the Defendant Southern Railway Co. in the town of Leadvale, Tenn., one Car of Ear Corn worth $400.00 on a contract that Defendant deliver said Corn to Complt. or its order in the City of Birmingham, Ala., in good order, the Defendant for a valuable consideration contracting to do so, in a reasonable time.

Complt. further states that on Nov. 13, 1902, it delivered to
3 Defendant Southern Railway Company in the town of Rankins, Tenn., another Car of Ear Corn worth $300.00 on a

contract that Defdt. would deliver said Corn to Complt. or its order in the City of Birmingham, Ala., in good order, the Defdt., for a valuable consideration contracting to do so, in a reasonable time.

(4) Complt. further show- that on Nov. 14, 1902, it delivered to Defendant Southern Railway Company in the town of New Market, Tenn., another Car of Ear Corn worth $400.00 on a contract that Defendant would deliver said corn to Complt. or its order in the City of Birmingham, Ala., in good order, the Defdt. for a valuable consideration contracting to do so in a reasonable time.

(5) Complt. further shows that on Nov. 17, 1902, it delivered to Defdt. Southern Railway Company in the town of New Market, Tenn., another Car of Ear Corn worth $300.00 on a contract that Defendant deliver said corn to Complt. or its order, in the City of Birmingham, Ala., in good order, the Defdt. for a valuable consideration contracting to do so in a reasonable time.

(6) Complt, further shows that on Nov. 18, 1902, it delivered to Defendant Southern Railway Company in the town of New Market, Tenn., another Car of car corn worth $400.00 on a contract that the Defdt. would deliver said corn to Complt. or its order in the City of Birmingham, Ala. in good order, the Defdt. for a valuable consideration contracting to do so in a reasonable time.

(7) Complt. further shows that on Nov. 19, 1902, it delivered to Defendant Southern Railway Company in the town of
4 New Market, Tenn., another Car of car cron worth $400.00 on a contract that Defdt. would deliver said corn to Complt. or its order, in the Cit*h* of Birmingham, Ala., in good order, the Defdt., for a valuable consideration contracting to do so in a reasonable time.

(8) Complt. further shows that on Nov. 20, 1902 it delivered to Defendant Southern Railway Company in the town of Jefferson City, Tenn., another Car of car corn worth $300.00 on a contract that Defdt. would deliver same to Complt. or its order in the City of Birmingham, Ala., in good order, the Deft., for a valuable consideration contracting to do so in a reasonable time.

(9) Complt. further shows that on Nov. 21, 1902 it delivered to Defendant Southern Railway Company in the town of New Market, Tenn., another Car load of car corn worth $300.00 on a contract that Defendant would deliver said Car of Corn to Complt. or its order in the City of Birmingham, Ala., in good order, the Defdt. for a valuable consideration contracting to do so in a reasonable time.

(10) Complt. further shows that on Nov. 22, 1902 it delivered to Defendant in the town of Leadvale, Tenn., another Car load of ear corn worth $300.00 on a contract that Defdt. would deliver said corn to Complt. or its order in the City of Birmingham, Ala., in good order, the Defdt, for a valuable consideration contracting to do so in a reasonable time.

(11) Complt. further shows that on Nov. 20, 1902 it delivered to Defendant Southern Railway Company in the town of Leadvale, Tenn., another Car of ear corn worth $300.00 on a contract
5 that Defdt. would deliver said corn to Complt, or its order in the City of Birmingham, Ala., in good order, Defdt. for a valuable consideration contracting to do so in a reasonable time.

(12) Complt. further shows that on Nov. 27, 1902 it delivered to Defendant Southern Railway Company another Car of ear corn worth $400.00 in the town of Rankins, Tenn., in good order, on a contract that the Defendant would deliver said Car of corn to Complt. or order in the City of Birmingham, Ala., in good order, the Defendant for a valuable consideration contracting to do so in a reasonable time.

The Defendants Southern Railway Company and Louisville & Nashville Railroad Company, at the time the foregoing several contracts, were made, were common carriers of goods and chattels for hire, the said Southern Railway Co. being the receiving and initial carrier and the one with which said contracts were made at the dates and places above mentioned, the Defendant Louisville and Nashville Railroad Company being the connecting and the ultimate Carrier and as such Carrier was bound by said contracts so made with Southern Railway Co. and the law relative to common carriers, to receive said several cars of corn, forward and deliver them to the destination whereunto consigned in good order and in a reasonable time. Complt. further shows that at the time said several contracts were made the Defendant Southern Railway Company was notified by the consignor of said corn that it was perishable in its nature, and was early, fresh corn gathered for and sold on an early market and must be carried and delivered without delay or it would heat
6 and damage and rot and if delayed it would not be received at the price sold for and would be practically worthless. This fact was fully explained by Consignor to Defendant at the time and Defdt. fully understood all this, and yet notwithstanding these facts and the fact that the Defendants agreed and were bound to carry and deliver said corn from the points above named — Complt. in Birmingham, Ala., in good order and in a reasonable time, Defendants or one of them breached the said several contracts aforesaid in that they or one of them wrongfully, carelessly and negligently delayed the delivery of said several cars of corn for an unreasonable and unnecessary time and failed and refused to carry and deliver said several cars of corn in good order and in a reasonable time as contracted and as they were bound to do, whereby said corn was greatly damaged, heated and was injured and was almost a total loss to the Complainants and Complainants on account of said breaches of the contracts aforesaid, were put to great expense in caring for, and selling said corn in its damaged and injured condition and Complt. lost the price and profits on said corn occasioned by the unreasonable and unnecessary delay of Defendants aforesaid, and Complainant is damaged Two thousand Dollars thereby.

Premises considered Complainant prays:—

1. That the Defendants named in the Caption be made parties to this suit by the service of subpœnas to answer and that each be required to answer this bill, but answers under oath are hereby waived.

2. That Complainant be given a decree against the Defendants or either of them for the difference in the value of this corn
7 shipped in said several shipments at the time and the condition it was delivered and its value at the time it should

have been delivered under the said several contracts and for interest on the amount for that date, and for all damages it has suffered and sustained by the breach or breaches of said contracts or any of them.

3. It prays for general relief.

C. T. RANKIN,
Sol. for Compl't.

Subpœna to Answer.

Oct. 20, 1903, subpœna for Louisville & Nashville Railroad Company, issued as follows:—

State of Tennessee to the Sheriff of Maury County, Greeting:

We command you to summon Louisville & Nashville Railroad Company if to be found in your County, to appear before the Chancellor of the Chancery Court at Dandridge, at the next Court, to be held at the Courthouse in Dandridge on the second Monday of Nov. next, then and there to answer the Original Bill of Complaint of Smith, Huggins & Company *vs.* Southern Railway Company and Louisville and Nashville Railroad Co. and further do and receive what our said Court shall consider in that behalf: and this you shall in nowise omit, under the penalty prescribed by the law.

8 Herein fail not, and have you then and there this writ.

Witness G. W. Holtsinger, Clerk and Master of our said Chancery Court, at office in the Courthouse at Dandridge, this 2n-, Monday in May, 1903, and the — year of American Independence.

G. W. HOLTSINGER,
Clerk and Master.

Officer's Return.

Came to hand Oct. 22, 1903, and executed in full as within commanded by reading the within Subpœna to A. H. Shields agent of Defdt. at its office in Columbia, Tenn. and I gave him a copy of this Subpœna and a copy of the Bill. The Defdt. Company being a foreign Corporation and neither its President, Vice-President, Secty. and Treas., nor any other officer nor Director of said Company to be found in my County, and I summoned the Defdt. Louisville & Nashville Railroad Company in the manner above stated to appear as commanded within.

This Oct. 24, 1903.

Reed. my fee $1.00 from Court.

C. I. GODWIN,
D. Sheriff.

Subpœna to Answer.

Oct. 22, 1903, subpœna for Southern Railway Company a Corporation, issued as follows:—

State of Tennessee to the Sheriff of Jefferson County, Greeting:

We command you to summon Southern Railway Company a Corporation if to be found in your County, to appear before the Chancellor of the Chancery Court at Dandridge, at the next Court, to be held at the Courhouse in Dandridge, on the 2n- Monday of November next, then and there to answer the Bill of Complaint of Smith, Huggins & Company a Corporation *vs.* Southern Railway Company a Corporation and further do and receive what our said Court shall consider in that behalf: and this you shall in nowise omit, under the penalty prescribed by the law.

Herein fail not, and have you then and there this writ. Witness G. W. Holtsinger, Clerk and Master of our said Chancery Court, at office in the Courthouse at Dandridge, this 2nd, Monday in May, 1903, and the — year of American Independence.

G. W. HOLTSINGER,
Clerk and Master.

Sheriff's Return.

Came to hand same day issued and executed as follows:—

The President, Vice President, Secretary and Treasurer and none of the Directors of Defendants' Company are to be found in my County. I therefore — this Process on J. A. Newman the agent of the Defendant Southern Railway Company in charge of its depot and office at New Market in my County and gave him a copy of the Bill in within named case.

This Oct. 23, 1903.

A. LICHLYTER, *Sheriff.*

Order.

Nov. 7, 1903, order filed, as follows:—

In the Chancery Court of Jefferson County, at Dandridge, Tenn.

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY CO. & LOUISVILLE & NASHVILLE R. R. CO.

By agreement of counsel for plaintiff and by leave of Court, the defendant, the Louisville & Nashville Railroad Company, is hereby

given further time until Tuesday Nov. 17, 1903, in which to prepare and file its answer to bill in this case.

C. T. RANKIN,
Sol. for Compl't.

INGERSOLL & PAYTON, *Att'ys.*

Answer of Louisville & Nashville R. R. Co.

Nov. 23, filed as follows:—

11 In the Chancery Court, at Dandridge.

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Answer of the L. & N. R. Co.

This respondent, for answer to the bill of complaint filed against it in this case, says:—

I.

That it has no knowledge of the character of the complainant as set forth in Section I. of the bill, nor of any of the contracts alleged therein, to have been made by it with the Defendant Southern Railway Company; nor of the alleged delivery by it to the Southern Railway Company of the car loads of corn set fourth in said Section I., and can therefore, neither admit nor deny the same, and if such allegations are material to this respondent it demands full proof of the same.

II.

And touching the allegations made in Section II. of said bill with relation to this respondent, it is admitted that respondent was
12 and is a common carrier of goods and chattels for hire, in certain States and portions of the country where it operates lines of railroad; but respondent denies the allegation that it was a connecting and ultimate carrier of the car loads of corn alleged to have been delivered to the Southern Railway Company; and denies that it was bound by the alleged contracts of the complainant with the said Southern Railway Company, or any of them. It also denies that it was bound by Law to receive said alleged car loads of corn and forward and deliver them to their ultimate destination in good order and in reasonable time.

III.

And this respondent has no knowledge touching the alleged notification by the complainant to the Southern Railway Company as to the alleged immature condition of said corn and its perishable nature, and that it would not be received, and would be practically

worthless, if delayed in shipment, and so can neither admit or deny said allegations; but if they be material to this defendant it demands proof thereof.

This respondent also denies that it ever made any contract whatever, with the complainant in regard to said car loads of corn, and denies that it had agreed to carry or was bound to carry and deliver said corn to Complainant in Birmingham, Ala., in good order and in a reasonable time; and denies that it ever breached any contract made by it with complt. in regard to said car loads of corn; and denies that it wrongfully, carelessly and negligently delayed the delivery of the same for an unreasonable and unnecessary time.

13 IV.

This respondent further answering says, that it has no knowledge touching the complainant's allegations that said alleged loads of corn were greatly damaged, heated and injured and that complainant thereby suffered almost a total loss on account of the said alleged breach of contract; or of the said alleged expense in caring for and selling said corn in its alleged damaged and injured condition; nor of its alleged loss of the price and profit on said corn occasioned by said unnecessary and unreasonable delay; and therefore respondent can neither admit nor deny said allegations, nor any of them; but if said allegations be material to this respondent, it demands full proof thereof.

This respondent denies, in fine, that it has ever made any contract with the complainant in regard to said loads of corn or the shipment or delivery thereof, and denies that it was under any contractual obligation to complainant in regard to same, and denies that it is liable to complainant for damages in any sum on account of the matters and things alleged in this bill.

And having fully answered said bill this respondent prays to be hence dismissed with its reasonable cost.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By HENRY H. INGERSOLL, *Counsel.*

INGERSOLL & PAYTON, *Solicitors.*

14 *Answer of Southern Railway Company.*

Dec. 26, 1903, filed as follows:—

No. 1622.

In the Chancery Court, at Dandridge, Tenn.

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Answer.

The Southern Railway Company, for separate answer to such portions of the bill of complaint filed against it and others, in the

above styled cause, as it is advised are material for it to answer says:—

I.

It is true that it is a foreign corporation, operating a Railroad through Jefferson County, Tennessee with offices and agents therein, as alleged. And it supposes that complainant is a corporation as averred in the caption of the bill.

Respondent neither admits nor denies the receipt of the specific shipments of corn set out in the bill. It shows that complainant holds its receipt and duplicate contract of shipment for each and every car received by respondent from it, and respondent is willing to admit the receipt by it of such cars as these contracts of shipment and receipts show. And it calls upon complainant to produce and file same in its proof, it admits, however, that it did receive
15 from complainant and shipped certain cars of corn during the fall of 1902 and possibly about the dates mentioned.

II.

But it denies that it was guilty of any unreasonable delay in moving the shipments mentioned in the bill, if received by it; but on the contrary avers that such shipments as were received by it were handled with all reasonable dispatch and delivered without unnecessary delay on the part of this respondent.

As to whether the corn was in the damaged condition as alleged by complainant, at its destination respondent does not know and cannot say from its own knowledge; but if it was damaged it was not in consequence of any delay or fault on the part of this respondent. And respondent denies that it was notified by complainant, as averred in the bill that said corn was for any reason more perishable or more liable to deterioration than ordinary shipments of corn. If such damage did result to these shipments it was not the delay of the respondent but the inherent defects of the corn that produced it and, respondent is advised that it is in no way responsible therefor.

III.

Further answering respondent shows to the Court that this corn was not shipped under its unrestricted liability, as a common carrier, but subject to certain limitations thereon contained in the shipping order, signed by complainant and in the B/L or contract of shipment signed by both complainant and itself. One of the original shipping orders given by complainant is herewith filed and marked
16 as exhibit "I" to this answer and as a part hereof and all other orders contained similar terms to this. The conditions are endorsed on the back of said shipping order and in the face of the B/L showing the limitations upon respondent's liability and they are here pleaded and relied upon in this case. Respondent avers that these restrictions upon its common law liability were supported by a proper consideration and abatement from the regular freight rates and that complainant assented to the terms thereof. Respondent

calls attention to the fact that under the terms of the order of shipment "claims for loss or damage must be made in writing at the point of delivery promptly after the arrival of the property and if delayed for more than 30 days after the delivery of the property or due time therefor no carrier under such contract shall be liable in any event. The same provision substantially appears in the B/L. Respondent shows to the Court that this provision of the contract is definite and designates, with certainty, the Agent upon whom notice shall be served. Any damage which may have been suffered by the corn was readily discernable when it was unloaded and there was every opportunity to have given the notice required by this provision of the contract to the agent delivering the cars so that the carriers might themselves have had the opportunity for inspecting the grain and determining the extent of any damages. Respondent insists that this provision is reasonable and important for the protection of the carrier's rights; but neither complainant nor any one else gave respondent or the agent of the delivering carrier, at the point of destination any such notice until on or about the 9th day of
17 February 1903. More than 30 days after the delivery of the corn; and after due time for the delivery thereof. And complainant pleads and relies upon this contractual limitation as bar to complainant's suit.

It further appears from the conditions upon the order of shipment and the similar provision upon the face of the contract of shipment that the respondent's liability for any damage ceases when same is ready for delivery to the consignee or the connecting carriers and that if the property is not removed by the person entitled to receive it within twenty-four hours after its arrival at its destination, it may be kept in the car at the sole risk of the owner. And respondent is informed and charges that complainant permitted some of these shipments of corn to stand for several days. Respondent relies upon all these limitations contained in the contract; and the facts, and that in the movements of the cars there was no unreasonable delay upon the part of respondent will be made to appear in the proof.

IV.

It appears from the bill itself that this corn was shipped in the month of November which during the year 1902, was a month of very heavy freight shipments over respondent's road; and respondent shows to the Court that owing to the press of business it could not be expected to move cars of freight with the dispatch which might be made in seasons of less press of work. And it shows to the Court that by its contract as well as under the law, *and* it was not bound to carry these shipments by any particular train or in time for any particular market or other wise than with such reasonable
18 dispatch as its general business would permit. This it insists was done. Complainant had notice at the time of the delivering of the corn to respondent, of this press of business and was advised that respondent could only move the corn with such degree of promptness, as its duties to other shippers would permit. And respondent refused to receive these shipments upon any other basis

and complainant assented thereto. In evidence of complainant's assent the word "released" was written across the face of the order of shipments and the freight contract. And respondent avers that the meaning of this word as was well known to the complainant at the time of shipment was that respondent should only move said corn with such promptness as the crowded condition of the freight shipments at that time permitted; and that it was released from any damage resulting from the delay in consequence of such conditions.

And all other allegations contained in the bill not expressly admitted or denied herein, are here denied; and strict proof is required of all allegations which may affect this respondent.

Now having fully answered respondent prays to go hence, without day and with its reasonable costs.

C. A. FRAME,
J. H. BUNDREN,
J. A. SUSONG,
Sols. for Def't So. Ry. Co.

19 EXHIBIT "I," "A."

(*Shipping Order.*) Form 409.

Southern Railway Company.

No. — 11/12, 1902.

Agent Southern Railway Company will ship, subject to the terms and conditions of the Southern Railway Company's regular Bill of Lading, the following articles, as described below, to:

Consignee: Smith, Huggins & Co.,
Destination: Birmingham,
State: Ala.

Articles.	Marks and numbers.	Weight, subject to correction.	Rate per 100.
I—Car Ear Corn..... Sou. 32600 S L. W. & C Released Bham # 582	.....	31696 lb	15c.

SMITH, HUGGINS & CO., *Shipper-*.

19*a* Conditions endorsed on back of shipping order "Ex. A" to answer of Southern Railway Co.:

Not Negotiable.

1. No carrier or party in possession of all or any of the Property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods, fire, jettison, ice, collision, delay or quarantine; or by robbers, riots, strikes or stoppage

of labor, or by leakage, breakage, chafing, loss in weight, decay, vermin, changes in weather, heat, frost or wet; or for country damage on cotton; or for any cause, if it be necessary or be usual to carry such porperty upon deck or upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any carrier between the point of shipment and the point to which the rate is given. All additional risks and increased expenses incurred by reason of change of route in cases of necessity, shall be borne by the owner of the goods and be a lien thereon.

3. No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and at the time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of such events such lower value shall be the maximum price to govern such
19*b* computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after the arrival of property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. Any carrier or party liable on account of any loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or — account of said property.

4. All property shall be subject to necessary cooperage, baling, and repairs at owner's cost. Each carrier over whose route cotton is to be carried hereunder, shall have the privilege of compressing the same, and shall not be held responsible for deviation or unavoidable delays in procuring *sich* compression.

Grain in bulk, consigned to a point where there is an elevator, may, (unless otherwise expressly noted therein, and then if it is not promptly unloaded) be there delivered, and placed with other grain of the same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weight or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person *party* entitled to receive it within twenty-four hours, after its arrival at destination, may be kept in a vessel, car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for
19*c* the detention of any vessel or car and for use of track after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder and hold said property subject to a lien therefor. Property destined to or taken

from a station or wharf at which there is no regularly appointed agent, shall be entirely at risk of owner when loaded from, or until loaded into cars, or vessel; and when received from or delivered on private or other sidings or wharves, shall be at owner's risk until cars are attached to, and after they are detached from, trains, or until loaded into, and after unloaded from vessel.

6. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are endorsed hereon.

7. Every party, whether principal, or agent, shipping inflammable, explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. If the word "Order" is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading properly endorsed shall be required before the delivery of the property at destination.

19*d* If any other than the aforesaid form of consignment is used here the said property may be at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

9. Owner or consignee shall pay freight, and average, if any, and all other charges accruing on said property, before delivery, and according to weights ascertained to any carrier hereunder; and if upon inspection, it is ascertained that the articles shipped, are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the tariff rates and under the rules provided for by public classification.

10. This bill of lading is signed for the different carrier- who may engage in the transportation, severally, but not jointly, each of which is to be bound by and have the benefits of the provisions thereof; and in accepting this bill of lading the shipper, owner and consignee, of the goods and holder of the bill of lading agree to be bound by all of the stipulations, exceptions and conditions, whether printed or written.

11. If all or any part of said property is carried by water, such water carriage shall be performed subject to statutory acts, and to all the conditions whether printed or written, contained in this bill of lading, including the condition that no carrier by water shall be liable for any loss or damage, resulting from explosion, accidents to boiler or machinery, or for any latent defects in hull, machinery or appurtenances existing before, at the time, or after shipment, or sailing on the voyage, unseaworthiness, provided the owners have exercised due diligence to make the vessel seaworthy; nor shall negligence be presumed against any carrier.

19*e* The carrier shall have liberty to transfer, to transship, to lighter, to call at any port or ports, to tow and to be towed, to deviate, to assist vessels in distress, to navigate without pilots, and to load and discharge goods at any time. If goods are landed by aggreement between any of the parties hereto and carried at any other than the regular wharf, station or landing of the carrier, each separate package or article shall be at the risk of the owner immediately upon such discharge. It is agreed that if any goods are sold short of ultimate destination, each carrier that has completed his part of the transportation, shall have earned his agreed upon proportion of the through freight, and the same, with the charges advanced, shall be due and payable out of the proceeds thereof, and for any distance carried, each carrier shall on the same basis, have earned and be entitled to freight, with charges advanced, for which part of the transportation as has been accomplished.

12. In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot, or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and goods may be returned by carriers at owner's risk, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carriers at owner's risk and expenses to shipping point earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even th-ugh same may have been done by carrier's
19*f* officers, crew, agent, or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

13. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation thereon of the agent of the carrier issuing the bill of lading shall be void.

20 MONDAY, *November* 30, 1903.

Be it remembered that this the 30th day of November 1903, being the special term of the Chancery Court, fixed at the regular November term 1903 and to which regular term of Court was adjourned, there was present Chancellor Hal H. Haynes the regular Chancellor assigned by the law to hold this Court when the following proceedings were had and ordered to be spread of record, to-wit:—

Order Allowing Time for Defense.

No. 1622.

SMITH, HUGGINS & CO.
vs.
SOUTHERN RAILWAY CO. ET AL.

Order.

In this cause upon application of defendants, they are allowed thirty days from the rise of the Court in which to answer.

Charter of Incorporation, Smith, Huggins & Co.

May 9, 1904, charter filed as follows:—

21 STATE OF TENNESSEE, DEPARTMENT OF STATE.

I, Wm. S. Morgan, Secretary of the State of Tennessee, do certify that the annexed Instrument, with Certificates of acknowledgment of Probate and Registration, was filed in my office for registration, on the 14th day of June, 1900, and recorded on the 14th day of June, 1900, in Corporation Record Book No. 4, in said office, page 78.

In testimony Whereof, I have hereunto subscribed my Official Signature; and, by order of the Governor, affixed the Great Seal of the State of Tennessee, at the Department in the City of Nashville, this 14th day of June A. D. 1900.

WM. S. MORGAN,
Secretary of State.

Charter of Incorporation.

Be it known that F. M. Smith, J. L. Huggins, A. J. Huggins, Jr., W. V. Moore, & M. L. Beeler are hereby constituted a body politic and corporate by the name and style of Smith, Huggins & Co. for the purpose of buying and selling agriculturing implements machinery, repairs, fertilizer, grain, coal, live stock, feed, real estate and produce, furnishing storage and engaging in livery business, with a capital stock of Fifteen Thousand Dollars, (15,000).

22 The general powers &c of said corporation are: To sue and be sued, by the corporate name; to have and to use a common seal, which it may alter at pleasure; if not a common seal, then the signature of the name of the corporation by any duly authorized officer, shall be legal and binding; to purchase to hold and receive by gift, in addition to the personal property owned by said corporation, and real estate necessary, for the transaction of the corporate business, and also to purchase or accept any real estate in payment of any debt due to the corporation, and sell realty for corporation purposes; to establish by-laws and make all rules and regulations, not inconsistent with the laws and the constitution, deemed expedient

for the management of corporate affairs and to appoint such subordinate officers and agents in addition to the President and Secretary and Treasurer as the business of the corporation requires, designate the name of the office, and fix the compensation of the officer.

The following provisions and restrictions are coupled with said grant of power: a failure to elect officers at the proper time does not dissolve the corporation, but those in office hold until the election or appointment and qualification of their successors. The term of all officers may be fixed by the by-laws of the corporation, the same however not to exceed two years. The corporation may by by-laws make regulations concerning the subscription for, or transfer of stock: fix upon the amount of capital to be invested in the enterprise, division of the same into shares, the time required for payment thereof by the subscribers of the stock, the amount to be
23 called for at any time, and in case of failure of any stockholder to pay the amount thus subscribed by him at the time and in the amount thus subscribed by him, at the time in the amounts thus called a right of action shall exist in the corporation to sue said defaulting stockholder for the same.

The board of directors, which may consist of five or more members, at the option of the corporation, to be elected either in person or by proxy, by a majority of the votes cast, each share representing one vote, shall keep a correct and true record of their proceedings, and an annual statement of receipts and disbursements, shall be copied on the minutes subject at all times to the inspection of any stockholder. The books of the corporation shall show the original or subsequent stockholders, their respective interests, the amount which has been paid on the share subscribed the transfer of stock by and to whom made, also other transactions in which it is presumed a stockholder or creditor may have an interest. The amount of any unpaid stock due from the subscriber to the corporation shall be a fund for the payment of any debts due from the corporation, nor shall the transfer of stock by any subscriber relieve him from payment, unless his transferee has paid up all or any of the balance on said original subscription.

By no implication or construction shall the corporation be deemed to possess any powers except these herein expressly given or necessarily implied from the nature of the business for which this Charter is granted, and by no inference whatever shall said corporation pos-ess the power to discount notes or bills, deal in gold or silver coin, or issue any evidence of debt as currency, or engage in any
24 business outside the purposes of the Charter. The right is reserved to repeal or modify this charter. If it is repealed or the amendments proposed being not merely auxiliary but fundamental are rejected by a vote representing more than the half of the stock of the corporation shall continue to exist for the purpose of winding up its affairs but not to enter upon any new business. If the amendments or modifications, being fundamental are accepted by the corporation as aforesaid, in a general meeting of the stockholders to be called for that purpose any minor married woman or other person under disability or any stockholder not agreeing to the

acceptance of the modifications shall cease to be a stockholder and the corporation shall be liable to pay the said withdrawing stockholder the par value of his stock, if it is worth so much, if not then so much may be its real value in the market on the day of the withdrawal of said stockholder as aforesaid, provided that the claims of all creditors are to be paid in preference to said withdrawing stockholder.

A majority of the board of directors shall constitute a quorum and shall fill all vacancies until the next regular election. The first board of directors shall consist of the five or more corporators and shall apply for and obtain the Charter.

The said corporation may have the right to borrow money and issue notes or bonds upon the faith of the corporate property, and also to execute a mortgage or mortgages as further security of payment of money thus borrowed.

We the undersigned apply to the State of Tennessee by the virtue of the laws of the land for a charter of incorporation for the
25 purposes and with the powers declared in the foregoing instrument.

June 11 1900.

M. F. SMITH.
J. L. HUGGINS.
A. J. HUGGINS, JR.
W. V. MOORE.
M. L. BEELER.

STATE OF TENNESSEE, *Jefferson County:*

Personally appeared before me S. M. Holtsinger, Clerk of the County Court within and for said State and County F. M. Smith, J. L. Huggins, A. J. Huggins, Jr. W. V. Moore and M. L. Beeler the within named incorporation with whom I am personally acquainted who acknowledged that they executed the foregoing instrument for the purposes therein contained.

Witness my hand and seal, at office in Dandridge, This June 11, 1900.

S. M. HOLTSINGER.

STATE OF TENNESSEE, *Jefferson County:*

I, F. I. Strange, Register of Deeds in and for said State and County, do hereby certify that the annexed Charter was received for registration at 9 A. M., on 12 day of June, 1900, and noted in Note Book No. 2, page 26, and regist-red in Trust Book No. 9, page 586.

This 12 day of June 1900.

F. I. STRANGE, *Register,*
By W. C. LYLE, *Deputy.*

26 *Original Notice to Take Depositions in Case of Smith, Huggins & Co. vs. Southern Ry. Company and L. & N. Railroad Co.*

In Chancery Court, Dandridge, Tenn.

No. 1622.

SMITH, HUGGINS & CO.
vs.
SOUTHERN RAILWAY CO. and LOUISVILLE & NASHVILLE RAILROAD CO.

To Louisville & Nashville Railroad Company, Def'd't:

Take notice that before A. H. Webster J. P. at his office in Jefferson City, Tenn., Compl't. Corporation will cause to be taken the depositions of W. V. Moore, M. L. Beeler, J. L. Huggins, J. B. Huff, F. M. Smith, G. W. Long, Frank Bartley and C. T. Rankin and Geo. Denton to be used as evidence on behalf of Compl't. in above styled cause. Said depositions will be commenced on Monday Jan. 11, 1904 at 10 o'clock A. M. and continued from day to day till completed, if necessary.

This Dec. 26, 1903.

SMITH, HUGGINS & CO.,
By C. T. RANKIN, *Att'y.*

We accept the within notice and waive service of same by officer. We have received a copy of same.

Dec. 28, 1903.

INGERSOLL & PAYTON,
Att'ys for Louisville & Nashville R. R. Co.

27–138 *Original Notice Smith, Huggins & Co vs. So. Ry. Co. & L. & N. R. R. Co.*

In Chancery Court, Dandridge, Tenn.

SMITH, HUGGINS & CO.
vs.
SOUTHERN RY. CO. and L. & N. RAILROAD CO.

To Southern Ry. Co., D'f'd't:

Take notice that before A. H. Webster, J. P. at his office in Jefferson City, Tenn. Compl't Corporation will cause to be taken the depositions of W. V. Moore, M. L. Beeler, J. B. Huff, J. L. Huggins, F. M. Smith, G. W. Long Frank Bartly. Geo. Denton and C. T. Rankin to be used as evidence on behalf of Compl't in above styled cause. Said depositions will be commenced on Monday Jan. 11,

1904, at 10 o'clock A. M. and continued from day to day if necessary till completed.

Dec. 26, 1903.

SMITH, HUGGINS & CO.,
By C. T. RANKIN, *Att'y.*

I delivered a full, true and perfect copy of this notice to Geo. E. Roff, Agent of Def'd't. So. Ry. Co. at its offices in Jefferson City, Tenn. the Def'd't Co. being a foreign Corporation and neither its President, Vice Pres't, Sec., and Treas., no*t* any other officer or stockholder of said Company to be found in my County.

This Dec. 26, 1903.

D. M. COILE, *D. S.*

* * * * * * *

139 *The Depositions of B. M. Starks, C. T. Black & J. R. Wheeler.*

May 9, 1904, depositions filed, as follows:

In the Chancery Court, at Dandridge, Tennessee.

No. 1622.

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY & LOUISVILLE & NASHVILLE RAILROAD CO.

Agreement of Counsel.

It is agreed that the following interrogatories and Cross-interrogatories may be submitted to B. M. Starks, witness for the defendant Louisville & Nashville Railroad Company, who resides at Birmingham, Alabama, and when same have been answered by him and his answers written out and sworn to before some officer competent to administer oaths said interrogatories and answers may be read in evidence in this cause free from exceptions other than irrelevancy or incompetency of the matters testified to. Informalities in caption, certificate and mode of transmission are particularly waived.

C. T. RANKIN, *Att'y.*
J. A. SUSONG, *Att'y for So. Ry. Co.*
CORNICK, WRIGHT & FRANTZ,
Att'ys for L. & N. R'd Co.

This stipulation and waiver of formalities is agreed to provided three days notice be given either to Jourolmon, Welcker & Hudson or J. A. Susong, of the time and place of taking said deposition, and the officer before whom they are to be taken, so that the Southern Railway Co. may then appear and cross-examine in person.

JOUROLMON, WELCKER & HUDSON.

140 *Interrogatories to be Propounded to B. M. Starks, Witness for the Louisville & Nashville Railroad Company, who Resides at Birmingham, Alabama.*

(1) Please state your age, place of residence and present occupation?

(2) Were you Superintendent of the defendant Louisville & Nashville Railroad Company, at Birmingham, Alabama, during the fall and winter of 1902 and 1903—if your answer is that you were superintendent please state what connection you had with the handling of cars consigned by Smith, Huggins & Company of Jefferson City from various East Tennessee points to themselves at Birmingham, Alabama?

(3) Please state whether you kept a record showing receipt by your road of said cars and the disposition of the same?

(4) I hand you herewith a copy of the declaration filed by plaintiffs in this case and list of cars covered thereby as contained in the copy of the deposition of Moore and others, I will ask you to state if all the cars that the Louisville & Nashville Railroad Company contracted to deliver upon the tracks of the Alabama Mill & Elevator Company were delivered there within a reasonable time after receipt of same?

(5) Please state what the condition of traffic was in your own yards at Birmingham at the time these cars of corn arrived at Birmingham—if your answer is that the yards were very con-

141 gested please state what steps you took with reference to handling of the freight of connecting roads?

(6) If your answer is that an embargo was established against connecting roads please state whether or not you notified the Superintendent of the Southern Railway Company at Birmingham, Alabama of such embargo and herewith file any correspondence which you have with the Southern Railway Company with reference thereto and state whether or not the same notices were given to other connecting lines at Birmingham?

(7) Didn't the Southern Ry. have a blockade in its yards at the same time?

(8) Please state any other fact or facts of your knowledge touching these various shipments or any other facts that are material to this controversy.

(9) Did So. Ry. Co. prorate freight with L. & N. on these cars, or merely pay it the usual switching charge of $2.00 per car?

CORNICK, WRIGHT & FRANTZ,
For L. & N. R'd Co.

Cross-examination by C. T. RANKIN, Att'y:

(1) How long did it take to deliver one of these cars by L. & N.?

C. T. RANKIN, *Att'y.*

142 In the Chancery Court, at Dandridge.

No. 1622.

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Deposition of B. M. Starks, witness for the Louisville & Nashville Railroad Company, taken at the office of Percy & Grubb, 818 Woodward Building, Birmingham, Alabama, on the 19th day of April, 1904, upon interrogatories filed in the cause.

To the 1st Int'y he says:

My age is forty one years (41). I live at Birmingham, Alabama. My present occupation is that of Supt. of the Louisville & Nashville Railroad Company at Birmingham, Alabama.

To the 2nd Int'y he says:

I was. I did not personally handle any of these cars.

To the 3rd Int'y he says:

Personally I kept no record.

To the 4th Int'y he says:

I have no personal knowledge of the facts inquired about — this interrogatory.

To the 5th Int'y he says:

143 On November 13, 1902, I notified the Supt. of each and every connecting line at Birmingham, Alabama, that Taking effect on November 14, 1902 at Noon, the Louisville & Nashville Railroad Company would, until further notice, decline to receive business from their respective lines for delivery on switching tracks within the switching limits of Birmingham, except perishable freight and package cars destined to our freight house. What was meant by perishable freight in the notice referred to would be such freight as green vegetables, fresh meat, poultry, or such other freight as might be traveling under refrigeration.

To the 6th Int'y he says:

I did notify the Supt. of the Southern Railway Company of such embargo and attach hereto as Exhibit "A" a true and correct copy of the notice sent the Superintendent of the Southern Railway Company notifying him of this embargo. I notified the Superintendent of each and every line entering Birmingham to the same effect sending each Superintendent of each and every line entering Birmingham a copy of the notice attached hereto as Exhibit "A" to this deposition.

To the 7th Int'y he says:

It was my understanding that the Southern Railway Co. had a blockade at the same time that our blockade existed.

To the 8th Int'y he says:

To the best of my recollection various consignees located on tracks

which we switched at Birmingham were at that time receiv-
144 ing such an unusually large quantity of car load business, over our rails and the connecting lines, which were turned over to us for placing on tracks which we switched, that they were not able to receive cars promptly enough after they were placed and continue this process rapidly enough to furnish track space at their respective locations for the placing of their business on arrival, and when it could not be so placed it was necessary for the cars to be held back in storage in other portions of the yard, ther-by congesting those tracks and bringing about a congestion, and in order to avoid having the congestion become more aggravated or more extensive it was necessary to place an embargo on this switching business coming from other lines until the accumulated freight referred to above was disposed of, so that business might proceed in its regular way at the usual unloading places as it was received from the connecting lines and not make it necessary to provide storage places for it as described in the foregoing; otherwise the blockade would have continued indefinitely or so long as shipments arrived in unusual large quantities as was the case at that particular time.

To the 9th Int'y he says:

I do not know.

Cross-examination.

By C. T. RANKIN, counsel for pla't'fs:

To the 1st X Int'y he says:

It would depend upon the conditions at the time the car was offered and received.

145 Further saith not.

B. M. STARKS.

Sworn to and subscribed before me, this 19th day of April, 1904.

ALYS C. VIGO.
Notary Public.

EXHIBIT TO DEPOSITION OF B. M. STARKS.

EXHIBIT "A."

Copy.

BIRMINGHAM, ALA., *Nov.* 13, 1902.

Mr. M. M. Richy, Sup't Southern Railway Co., City.

DEAR SIR: This is to notify you that, taking effect at noon tomorrow, November 14th, we will, until further notice, decline to receive business from you for delivery on switching tracks within the switching limits of Birmingham, except perishable freight and

package cars for our house. Please instruct your agents accordingly.

Yours truly,

B. M. STARKS,
Superintendent.

146 In the Chancery Court of Jefferson Co.

No. 1622.

SMITH, HUGGINS & CO.
vs.
SOUTHERN RY. CO. ET AL.

Agreement.

It is agreed that the following interrogatories and cross-interrogatories may be submitted to J. R. Wheeler, witness for L. & N. R. R. Co. who resides in Birmingham, Ala. and when the same have been answered and the answers have been written out and sworn to by him before some officer competent to administer oaths, said questions and answers may be read in evidence in this case free from exceptions other than irrelevancy or incompetency of the matters testified to. Informalities of caption, certificate and mode of transportation are particularly waived.

C. T. RANKIN,
Att'y for Plaintiff.

____ ____,
Att'y for So. Ry. Co.
J. B. WRIGHT,
Att'y for L. & N. R. R. Co.

This stipulation and waiver of formalities is agreed to provided three days' notice be given either Jourolmon, Welcker & Hudson or J. A. Susong of the time and place of taking said depositions, and the officer before whom they are to be taken, so that the Southern Railway Company may then appear and cross-examine in person.

JOUROLMON, WELCKER & HUDSON.

Interrogatories to be Submitted to J. R. Wheeler, Witness for L. & N. R. R. Co., Who Resides at Birmingham, Ala.

(1.) Please state your age, place of residence and occupation.

(2.) Please state if you were Assistant Superintendent of the L. & N. R. R. in Birmingham, Ala. during the fall and winter 1902-1903?

147 (3.) If you were state what connection you had with the handling of cars consigned by Smith, Huggins & Co. from Jefferson City and other East Tennessee points to themselves at Birmingham, Ala.

(4.) Please state all you know about the embargo that was raised

by the L. & N. R. R. on the 14th of November, 1902 giving the reasons why the same was raised, if notice was given to all connecting lines, and whether or not you handled all cars that you were able to handle for other yards during that time?

(5.) Please state if the cars were not handled with reasonable dispatch the L. & N. R. R. Co. agreed to handle the cars to the service track of the Alabama Mill & Elevator Co.?

(6.) Please state if there were not other elevators in Birmingham on the tracks of the Southern Ry. Co. where these various cars loaded with corn could have been taken immediately after their arrival in Birmingham over the Southern Railway?

(7.) Please state all you know with reference to the handling of these various cars by the L. & N. R. R. during the months of October, November and December, 1902?

CORNICK, WRIGHT & FRANTZ,
For L. & N.

Cross-examination.

By C. T. RANKIN, att'y for pl't'ff.

Q. 1. If the Southern Ry. Co. tendered these cars to L. & N. for delivery and placing to be unloaded why did L. & N. not accept them and deliver?

C. T. RANKIN,
Att'y for Pl't'ff.

148 In Chancery Court of Jefferson County.

No. 1622.

SMITH, HUGGINS & COMPANY,
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Deposition of J. H. Wheeler, witness for the Louisville and Nashville Railroad Company, taken at the office of Percy & Grubb, at 818 Woodward Building, Birmingham, Alabama, on the 29th day of April, 1904, upon interrogatories filed in the cause.

To the 1st Int'y he says:

My age is 38 years. I reside in Birmingham, Alabama. I am Assistant Superintendent of the Louisville & Nashville Railroad Company at Birmingham, Alabama.

To the 2nd Int'y he says:

I was.

To the 3rd Int'y he says:

I had no personal connection with the handling of these cars other than the issueing of general instructions with reference to the embargo in the yard at that time.

To the 4th Int'y he says:

(There was an embargo placed by the Louisville & Nashville Rail-

road Company on the 14th day of November, 1902, against all lines entering Birmingham. This embargo was placed on account of the congested condition of the Birmingham yards of the L. & N. Rd. Co. with inbound business consigned to various consignees on the various tracks to such an extent that the inbound business
149 could not or was not being unloaded as fast as it was received and on that account business that was received had to be held in storage tracks outside of the unloading yard proper until room could be had on unloading tracks to accommodate same. Notice of this embargo was given to each Superintendent of every railroad entering Birmingham and the notice given was that the Louisville & Nashville Railroad Company would on November 14, 1902, at noon, decline to receive from them car load business to be handled within the switching limits of Birmingham, except perishable freight and cars containing package freight for our house. By perishable freight was meant such freight as green vegetables, fresh meat, poultry, or such other freight as might be traveling in refrigeration. The Superintendent of the Southern Railway Company was notified at the same time all other Superintendents whose roads entered Birmingham were notified. We handled all cars that we were able to handle for each and every road during that time. As I recall it now the yards of all the railroads at Birmingham were congested at the time this embargo was placed. This embargo was due the extraordinary amount of car load freight being handled at that time by all the railroads entering Birmingham. This embargo was placed against all of the railroads with whom the Louisville & Nashville did business at that time, which was all the railroads entering Birmingham affiant now remembers. The various consignees located on tracks to which we switched in Birmingham, which consignees included the Alabama Mill & Elevator Company, were during that time receiving such an extraordinary amount of car load freight, both over the rails of the Louisville & Nashville and other connecting lines, which business was turned over to us to be switched to ware-
150 houses of consignees on our tracks, that the consignees were not able to relieve cars promptly enough after they were placed to them on track to their warehouse, to enable empties to be pulled out and additional loads placed and to continue this process rapidly enough to furnish track space at their respective locations for the placing of their business on arrival. When consignees did not have such room it was necessary for the cars to be held back in storage in other portions of the yard, which congested those tracks, thus causing a congestion, and it was in order to prevent the congestion becoming more extensive that this embargo was placed against the switching of cars coming from other lines, until the accumulated freight was disposed of. Had not this embargo been placed the congestion would have become so extensive that the blockade would have continued indefinitely, or so long as shipments arrived in unusual and extraordinary large quantities as was the case at the time the embargo was placed. The Alabama Mill & Elevator C-mpany advised during this embargo that they had arranged to cancel orders on those lines connecting with the Louisville & Nashville Railroad

and over which they had been receiving shipments of car and other corn, for future shipments of car corn, or other corn, until we would advise them that we could again commence handling the switching traffic as between their plant and the connecting lines at Birmingham. We get two dollars per car for switching shipments from connecting lines at Birmingham to industries located within switching limits of Birmingham. On January 7, 1903, we resumed the interline switching business, as between all the lines at Birmingham, the same as before this embargo was placed on same, except that
151 we did not receive this traffic faster than consignees could unload it promptly, as we could not undertake to receive it and stand it on the hold tracks, or on our yard tracks, where it would interfere with the handling of through traffic. It was my understanding that the Southern Railway Company's yards were blocked at the same time we had this embargo placed.)

To the 5th Int'y he says:

The cars were handled with reasonable dispatch after the Louisville & Nashville agreed to handle the cars to the service track of the Alabama Mill & Elevator Company.

To the 6th Int'y he says:

I do not know.

To the 7th Int'y he says:

I have stated all I know with reference to the handling of these cars. I attach hereto, marked Exhibit "A" a map of our Birmingham yard, showing connecting tracks, warehouse of Alabama Mill & Elevator Company, and the yard plan in general. Track marked "A" is the Southern Railway delivery or transfer track, that is, the track where the Southern Railway places its cars which are to be switched to the Louisville & Nashville; the track marked "B" is the Louisville & Nashville delivery or transfer track, that is, the track where the Louisville & Nashville places its cars which are to be switched or transferred by the Southern Railway; the track marked "C" is the track of the Louisville & Nashville Railroad Company on which the Alabama Mill & Elevator Company's ware-
152–172*a* house is located; the point marked "D" is where the warehouse of H Chairsell is located. The distance from where the Louisville & Nashville would receive cars from the Southern Railway to the Alabama Mill & Elevator Company's warehouse is about three hundred (300) yards.

Cross-examination.

By C. T. RANKIN, counsel for pl'ff:

To the 1st X Int'y he says:

I do not know.

To the 2nd X Int'y he says:

I have stated all that I know about these cars and their delivery to and receipt by the Louisville & Nashville Railroad from the Southern Railway in my answer to direct interrogatories.

Further saith not.

J. R. WHEELER.

Sworn to and subscribed before me, this the 29th day of April, 1904.

ALYS C. VIGO,
Notary Public.

* * * * * * *

172*b* MONDAY, *May* 9, 1904.

Be it remembered that at a regular term of the Chancery Court, begun and held for the County of Jefferson, at the Court-house in the town of Dandridge on the second Monday in May, 1904, it being the 9th day of said month, present and presiding the Hon. Hal. H. Haynes Chancellor, the Chancellor assigned by law to hold said Court, when the following proceedings were had and entered of record, to-wit:

173–180 *Order and Agreement.*

No. 1622.

SMITH, HUGGINS & CO.
vs.
SOUTHERN RAILWAY CO. and LOUISVILLE & NASHVILLE RY. CO.

In this cause it is agreed by the Complainants and Defendants that this cause will be submitted to the Chancellor, holding this Court, on briefs at Chambers, when the Chancellor may pronounce a decree in this cause and file same with the Clerk and Master of this Court, when said decree shall become effective as if regularly pronounced at a regular term or session of this Court, and either party shall have ten days from the notice of the filing of said decree, in which to file an appeal bond and perfect an appeal, if they or either of them shall so desire, and it is further agreed that no question shall be raised in the Supreme Court because said cause was tried at Chambers.

It is further agreed that either side or party may take additional proof within the next 30 days, if so desired, but not after that date.

L. & N. did not agree to this.

* * * * * * *

181 MONDAY, *November* 28, 1904.

Be it remembered that on this the 28th day of Nov. 1904, being the special term of the Chancery Court, fixed at the regular Nov. term and to which regular term of Court was adjourned, there was present Chancellor Hal H. Haynes, the regular Chancellor assigned by law to hold this Court, when the following proceedings were had and ordered to be spread of record, to-wit:

SATURDAY, *December* 31, 1904.

Court met pursuant to adjournment, present and presiding the Hon. Hal. H. Haynes, Chancellor, the same Chancellor as on yesterday, when the following proceedings were had and entered of record, to-wit:—

SMITH, HUGGINS & CO.
vs.
SOUTHERN RAILWAY CO. ET AL.

Decree.

This cause was regularly heard before the Chancellor at a former day of this term, and taken under advisement, and after consideration of the case, it is ordered, adjudged and decreed as follows:

I.

That, as between Complainant and the defendant L. & N. Ry. Co., there is no liability on the part of the said L. & N.
182 Ry. Co. and what the rights of defendant Railway Companies, growing out of the transaction involved, are, as between themselves, need not be determined in this case.

II

That the defendant Southern Railway Company, by its contract, undertook to transport this freight with reasonable dispatch, and to deliver the same, according to its custom, at the warehouse of the A. M. & E. Co., on the siding of the L. & N. Railway Co., Birmingham, Ala.; and that nothing shown in its defense herein, excused it from so doing. It had previously done so, for these same shippers, and its custom was to solicit and receive the freight for shipment, to be delivered as aforesaid; and Complainant having contracted with said defendant, relying upon such custom etc., said defendant Southern Railway Co., cannot complain (its private arrangement with said L. &. N. Ry. Co. having failed) and say that a delivery on its own siding, or at its own depot, was a delivery at Birmingham, within the meaning of said contract.

III.

This suit is therefore, dismissed as to the said defendant L. & N. Railway Co. And the defendant Southern Railway Co. is held liable for such damages as accrued to Complainant, by reason of the breach of the said contract, in failing to deliver the cars of corn in question, within reasonable time, at the warehouse of said Alabama Mill & Elevator Co., in Birmingham, Ala. And the measure of damages will be the difference in the market value of said corn, if delivered according to contract, and the market value thereof, as and when delivered.

But, because some of said cars of corn appear to have been carried through to Birmingham, within reasonable time, yet they
183 arrived there in a damaged condition, and would therefore necessarily have been damaged if delivered promptly according to contract, the Court is not satisfied now to fix the amount of damages to be recovered hereunder, and this cause is referred to the Master, who will, from the proof on file, and such other as may be offered, report and show:

(1.) How much was any of said cars of corn damaged in transit, allowing a reasonable time therefor?

(2.) What was the total damage thereto, and how much is the defendant Southern Railway Co. liable for, under the holding of the Court herein?

(3.) The Master will report as to any other point that may seem to him proper and necessary; and will make his report as soon as practicable.

The defendant Southern Railway Co. duly prayed an appeal from the foregoing decree, which was disallowed until the incoming of the report ordered.

Deposition of E. F. Stollenwerck.

Nov. 28, 1904, deposition filed, as follows:

184 In the Circuit Court of Jefferson County.

No. —.

SMITH, HUGGINS & COMPANY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY & SOUTHERN RAILWAY COMPANY.

Interrogatories to be propounded to witness E. F. Stollenwerck, who lives at Birmingham, Alabama, and upon which his deposition will be taken to be read as evidence on behalf of the defendant, Louisville & Nashville Railroad Company, in the above entitled cause.

It is agreed by and between the various parties to this case and to the other suit pending in the Circuit Court of Jefferson County between the same parties and in the suit pending in the Chancery Court of Jefferson County between the same parties that the deposition of the witness E. F. Stollenwerck may be taken upon the attached original interrogatories and cross-interrogatories without filing the same with the Clerk of the Court and without further notice and that when taken the same may be read as evidence in each of said causes free from objection as to the matters of form, all
185 formalities being waived, the right being reserved to object

to any part of said deposition for irrelevancy, immateriality or any matter not going to the form.

C. T. RANKIN, *Att'y for Smith, H. & Co.*
JOUROLMON, WELCKER & HUDSON,
Att'ys for So. Ry. Co.
CORNICK, WRIGHT & FRANTZ.

Interrogatory 1. State your name, age, residence and occupation, and also state what your occupation was during the fall and winter of 1902?

Interrogatory 2. If you state that you were Train Master of the Louisville & Nashville Railroad at Birmingham, Alabama, also state whether or not you were acquainted with the lines, terminals, terminal facilities, switch-yards, equipment and switching equipment of said railroad in the City of Birmingham during the fall of 1902 when various shipments of corn arrived at Birmingham from Smith, Huggins & Company and with reference to which these law-suits have been brought?

186 Interrogatory 3. State fully the nature of said terminals and equipment of the Louisville & Nashville Railroad and whether or not they were sufficient and adequate under ordinary circumstances and conditions?

Interrogatory 4. State whether ordinary conditions and circumstances prevailed at the time said shipments arrived at Birmingham from Smith, Huggins & Company and if you say ordinary conditions and circumstances did not exist state fully what the circumstances and conditions were on the yards and terminals of said Louisville & Nashville Railroad Co.?

Interrogatory 5. State whether or not the equipment and terminal facilities of said Louisville & Nashville Railroad Company were sufficient for handling business arriving in Birmingham over other lines of railway during said period and if not explain fully why not.

Interrogatory 6. If you are acquainted with the handling of the cars shipped by Smith, Huggins & Co. and out of which this controversy arose state how they were handled and whether

187 they were handled with all possible expedition and dispatch under the circumstances existing *with* you have outlined in answer to previous questions?

Interrogatory 7. State any other fact or facts within your knowledge relative to this controversy and about which you have not been questioned in the foregoing interrogatories?

CORNICK, WRIGHT & FRANTZ,
Att'ys for L. & N.

Cross-interrogatories to be propounded to E. F. Stollenwerck, witness for the defendant-, Louisville & Nashville Railway Co. *et al.*, in the Chancery and Circuit Courts of Jefferson County, Tennessee.

1. If in answer to Interrogatory No. 2. in chief you state that you are acquainted with the various lines, tracks, terminals etc., of the L. & N. Railroad at Birmingham,—further state if it is not a fact

that the various warehouses for handling grains etc. are principally located upon the tracks of the said L. & N. Railroad Co. in Birmingham.

188 2. How long have you been acquainted with the various lines of the L. & N. Railroad at Birmingham, and their method of operation?

3. Is it not a fact that the L. & N. Railroad has for some years been accustomed to regularly receive cars of freight consigned to parties whose places of business are upon its lines, which cars arrived in Birmingham over other roads, and place said cars at the places of business of the consignees?

4. Had it not for some time prior to the Fall of 1902 been accustomed to receive cars brought there by other roads, consigned to parties upon its lines and place said cars at points desired receiving therefor a charge from either the connecting railroad, shipper or the consignee?

5. Had it not held itself out as ready and willing to move and place cars of freight in this manner? And was not the moving and placing of such cars, a matter of daily occurrence and a part of its business in Birmingham?

6. Had it not been accustomed for some time prior to the Fall of 1902 to receive cars shipped to or brought by the Alabama Mill & Elevator Company, and place them upon its tracks in position to be unloaded by that Company into its buildings or warehouses; although said cars arrived at Birmingham over the Southern or other roads.

189 7. If you say an embargo had been laid upon freight reaching Birmingham over other roads in 1902, state whether it had previous to that time refused to receive cars in this manner and how often and when.

8. If you say that the equipments of the L. & N. Railroad were not sufficient for handling the business required in Birmingham, in October, November and December, 1902, state what was the comparative amount of freight handled in the Fall of 1902 in Birmingham over the L. & N. lines there as compared with that in 1901. If you have any record of these matters which will enable you to give the aggregate tonnage of these months for the years of 1901 and 1902 file it as an exhibit to this deposition.

9. If you say that the capacity of your equipment was overtaxed during said months of October, November and December 1902 state whether any effort was made to procure additional motive power from other points along said railroad. And in connection with this inadequacy of equipment, state whether any increase in equipment was made in Birmingham in that fall and what it was and describe fully.

10. If you say your equipment was inadequate state in what respect it was inadequate, in motive power or men or in what other respect.

11. Had not the L. & N. Railroad for sometime previous to the fall of 1902 maintained a spur track at Birmingham, mak-

ing physical con-ections with the Southern's lines for the
190 purpose of receiving cars brought to Birmingham over the Southern Railroad and which were to be placed at the places of business of the purchasers situated upon the L. & N. Road? If you say that this was not the purpose of the spur track making the physical connection with the Southern, and upon which these cars shipped by Smith, Huggins & Co. in the fall of 1902, were placed, state what was the use of this track and what was the purpose for which it was maintained.

J. H. BUNDREN,
J. E. SUSONG,
Att'ys for Def'd't.

191 In the Circuit Court of Jefferson County.

No. —.

SMITH, HUGGINS & COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY.

Answers to Interrogatories Propounded to E. F. Stollenwerck.

E. F. STOLLENWERCK being first duly sworn states as follows:

To the 1st Int'y. My name is E. F. Stollenwerck; my age 46 years; my residence Birmingham, Alabama; my occupation is that of Train Dispatcher for the Alabama Great Southern Railroad Company at Birmingham, Alabama; my occupation during the fall and winter of 1902 was that of Train Master for the Louisville and Nashville Railroad Company at Birmingham, Alabama.

To the 2nd Int'y. I was acquainted with the lines, terminals, terminal facilities, switch-yards, equipment and switching equipment of the Louisville & Nashville Railroad in the City of Birmingham during the fall of 1902, when various shipments of
192 corn arrived at Birmingham from Smith, Huggins & Company.

To the 3rd Int'y. The terminals and equipment of the Louisville & Nashville Railroad were sufficient and adequate under ordinary circumstances and conditions.

To the 4th Int'y. Ordinary conditions and circumstances did not prevail at the time said shipments arrived at Birmingham from Smith, Huggins & Company. The yards of the Louisville and Nashville Railroad Company at Birmingham during the months of September, October, November and December of 1902 were badly congested on account of the unprecedented business originating on their line. The Louisville and Nashville Railroad in the Birmingham District was amply supplied in every way with facilities for the transportation of freight and the handling of same at its terminals under ordinary circumstances. It had sufficient equipment for ordinary

purposes and under ordinary circumstances and was able to carry goods with expedition under ordinary circumstances and conditions.

To the 5th Int'y. The terminals and equipment of the Louisville and Nashville Railroad for handling freight were sufficient under ordinary circumstances and conditions not only for handling all traffic originating on its own line but were sufficient for the proper and speedy switching of the cars of other roads in the Birmingham District, but on account of the unprecedented traffic originating on the Louisville and Nashville Railroad Company's own line at
193 the time these cars covered by this law suit arrived in Birmingham the Louisville and Nashville Railroad was neither able to handle the traffic originating on its own line nor was it able to switch the cars of other railroads coming into the Birmingham District.

To the 6th Int'y. I know that all cars received by the Louisville and Nashville Railroad Company from other lines to be switched were handled with all possible expedition and dispatch under the circumstances existing at that time, after the Louisville and Nashville Railroad Company actually received the cars.

To the 7th Int'y. At the time these cars in question arrived at Birmingham the Louisville and Nashville Railroad Company had an embargo placed against all railroads entering Birmingham, including the Southern Railway Company; this embargo was placed against all the railroads who had cars to be switched to different warehouses on the tracks of the Louisville and Nashville Railroad; this embargo was placed because the freight received by the Louisville and Nashville Railroad at that time was extraordinary and it was all the Louisville and Nashville Railroad could do to handle its own freight; that the Louisville and Nashville Railroad Company had facilities and equipment for handling its own freight and the freight of other roads under ordinary circumstances, but at the time these cars came the freight was extremely heavy and all the
194 railroads were taxed to their utmost to handle it; that when the Louisville and Nashville Railroad Company did finally accept shipments from other railroads, including the Southern, it handled them all with reasonable dispatch and promptness.

To the 1st X Int'y. Principally the various warehouses for handling grain, etc., in Birmingham are located upon the tracks of L. & N. Railroad Company.

To the 2nd X Int'y. Been acquainted with the various lines of the L. & N. Railroad Company at Birmingham and their method of operation for about fifteen years.

To the 3rd X Int'y. Yes, for a compensation.

To the 4th X Int'y. Yes.

To the 5th X Int'y. It had until the unprecedented volume of business during the fall of 1902 demonstrated that it could not receive this freight and handle with usual promptness in addition to freight reaching Birmingham over its own rails, and it was then that the embargo was placed upon the other roads.

It was a part of its business and a daily occurrence until
195 the rush of business made it physically impossible and it was then that the embargo was placed.

To the 6th X Int'y. Yes it had.

To the 7th X Int'y. The L. & N. Railroad Company previous to the placing of this embargo in 1902 had not refused to receive cars in this manner except when individual embargoes were placed temporarily upon certain firms who could not release cars thus received with usual promptness. To my knowledge the embargo of 1902 was the first general embargo against foreign roads to receiving freight for the city delivery.

To the 8th Int'y. I have not the information at hand to give the data requested; however the current of traffic was heavier than 1901 and the equipment and facilities of the road were inadequate to meet the demands with usual promptness.

To the 9th Int'y. It was not a question of motive power because of the fact that engines used in road service could have been utilized in switch service in Birmingham Yard and, furthermore, instances are numerous where this motive power mentioned had been used in Birmingham terminals to the detriment of the road service. It was a question of insufficient trackage room to handle the
196 immense volume of business concentrated at this point.

As mentioned above road engines were used in preference in switch service during this congestion. Extra crews and engines were used in yard whenever practicable.

To the 10th X Int'y. This cross-interrogatory has been answered by the answer to cross-interrogatory 9.

To the 11th X Int'y. The L. & N. R. R. Company does not own or maintain a connecting track with the Southern Railway at Birmingham. There is a connecting track owned and maintained by the Southern Railway over which all interchange of traffic between the Southern and Louisville & Nashville Railroad is conducted.

E. F. STOLLENWERCK.

Sworn to and subscribed before me, this 6th day of July, 1904.

J. L. DILLON,
Notary Public, Jefferson County, Alabama.

197 *Exceptions in Behalf of Southern Railway Co.*

April 18, 1905, exceptions filed, as follows:

In Chancery Court, at Dandridge, Tenn.

No. 1622.

SMITH-HUGGINS & Co.
vs.
SOUTHERN RAILWAY CO. ET AL.

Exceptions Filed in Behalf of Southern Railway Co.

The Southern Railway Company excepts to the Report of the Master because

I.

The Master does not report separately on 1st and 2nd heads of the reference. He does not distinguish the damages incurred in transit, after allowing reasonable time therefor, from the total damages sought to be ascertained under the 2nd head.

The proof is clear that from 2/3rds. to 3/4ths. of this damage did not accrue in transit; but after arrival of cars in Birmingham, and while on the Yards.

Depo. W. V. Moore, Q's 8 and 10 in ch.
X. Ex. by Wright Q's 2-9. Q's 14-16.
1st. Re-X. Ex. Q. 1.
198 X. Ex. by Bundren Q's 9-13, 18, 21.
2nd. Re Ex. Q. 2.
M. L. Beeler X. Ex. behalf So. Ry. Co. Q. 12.
W. J. Dobbs, Ans'rs to Int's 5 and 8.

II.

The Report is excepted to in so far as it reports damage of $94.42 on shipment No. 10 because this shipment was not handled in Birmingham by the Southern, but by the A. G. S.

Pelter Ans. to Int. 4.

BUNDREN, SUSONG & GARRELL,
Solicitors.

MONDAY, *May* 8, 1905.

Be it remembered that a regular term of the Chancery Court begun and held for the County of Jefferson at the Court-house in the town of Dandridge on the 2nd Monday in May 1905, it being the 8th day of said month present and presiding the Hon. G. McHenderson Judge of the 2nd Judicial Circuit of Tenn. assigned by law to hold said Court when the following proceedings were had and entered of record to-wit:

Thereupon the Hon. Hal H. Haynes, Chancellor for the First Chancery Division of Tennessee, assumed the Bench, setting by interchange with the Hon. G. McHenderson Judge, when the following proceedings were had and entered of record to-wit:

199 Rendered Decrees in the following causes to-wit: W. A. Layman *vs.* J. C. Layman and J. J. Miller *vs.* Eugene Holtsinger the said decree*d* were signed by the said Hal H. Haynes Chancellor &c. and were entered of record when the Hon. G. McHenderson Chancellor &c. resumed his position on the Bench and the further proceedings were had and entered of record as hereafter shown.

Decree Confirming Report and Granting Appeal.

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Decree Confirming Report.

This cause was this day heard upon the record, and especially upon the report of the Clerk and Master filed herein March 9, 1905, and Exceptions thereto. And being duly heard and the Master having amended his report so as to show the percent. of damages suffered by the corn in transit, and while in yard the first exception was overruled. But the 2nd exception is sustained, and the damages upon shipment No. 10 mentioned in the report, $94.42 is stricken out and the amount allowed by the Master is abated by this sum. The report is otherwise confirmed and is in the words and figures following:

200 *Report of Master on Reference.*

March 9, 1905, report filed, as follows:

SMITH, HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Master's Report on Reference.

The undersigned would respectfully report that in obedience to a decree passed at present term of Chancery Court directing the Master, from the proof on file and such other proof as may be offered, to report and show

I.

How much was any of said cars of corn damaged in transit allowing a reasonable time therefor.

II.

What was the total damages thereto and how much is the defendant Southern Railway Co. liable for under the holding of the Court.

III.

The Master will report as to any other point that may seem to him proper and necessary and will make his report as soon as practicable.

201 I report as follows:

As to first head I report:

That all of said cars of corn were damaged in transit and as a natural consequence the damage would still become worse while standing in the yard as I understand the proof fixing the per cent of damages as between in transit and standing in the yards 40% occurred while in transit and 60% while standing in the yards. See Dep. of W. V. Moore Folio 3 pages 8-19-20 and 21 & 24, also Dep. of M. L. Beeler, Folio 2 pages 17 and 18, also Dep. of W. J. Dobbs Folio 5 pages 6 and 7. Some were found worse than others I cannot report how much any of said cars of corn were damaged in transit or while standing in the yard exactly to a bushel or what the per cent. of damages was to a certainty as I do not think any of the witness' attempts to fix the per cent. of damages to the corn except as an estimate and merely a matter of opinion based on such an examination as could be given loaded cars before unloading. I can only report the damages by comparing what was offered for the corn in good condition and what it was sold for in its damaged condition as follows:

First shipment 402-52/74 bushels was contracted at 60 cents per bushel (see Exhibits "A," "B" & "C" to deposition of M. L. Beeler Folio 2 pages 2-3 & 4.)

It would have brought if it had been all right	$241.62
It sold at 45½ cts. per bu	182.91
Lost to Compl'ts on 1st shipment	$58.71

(See receipt of Southern Ry. Co. Ex. "A" to deposition of W. V. Moore Folio 3 page 1.)

202 3rd shipment 457½ Bu. it was contracted at 60 cents per bu. see same exhibits to deposition of M. L. Beeler.

It would have brought had it been all right	$274.50
It was sold for 45½ cts. per bu	208.16
Loss to compl'ts on 3rd shipment	$66.34

(See Exhibit "C" to deposition of W. V. Moore Folio 3 page 1.)

5th shipment 471 46/74 bu. it was contracted at 60 cts. per bu. (see same exhibits to dep. of M. L. Beeler.)

It would have brought..... $282.97
It sold for 45½ cts. per bu..... 214.58

Loss to Compl'ts on 5th shipment..... $68.39

(See Exhibit "D" to Dep. of W. V. Moore Folio 3 page 1.)

6th shipment 779 64/100 Bu. it was contracted at 60 cts. per bu. (see same exhibits to dep. of M. L. Beeler Folio 2 pages 2-3 & 4.)

It would have brought..... $467.91
It sold in its damaged condition for 45½ cts. per bu..... 341.18

Loss to Compl'ts on 6th shipment..... $127.73

(See Ex. "E" to dep. of W. V. Moore Folio 3 page 1.)

203 7th shipment 708 48/74 Bu. it was contracted for 60 cts. per bu. (see same exhibits.)

It would have brought at that price..... $425.18
In its damaged condition it brought 45½ cts. per bu.... 322.43

Loss to Compl'ts on 7th shipment..... $102.75

(See exhibit "F" to dep. of W. V. Moore Folio 3 page 1.)

8th shipment 202 52/74 Bu. it was contracted at 60 cts. per bu. (see same exhibits.)

It would have brought..... $121.62
In its damaged condition it brought 45½ cts. per bu..... 92.21

Loss to Compl'ts on 8th shipment..... $29.41

(See Exhibit "G" to dep of W. V. Moore Folio 3 page 1.)

9th shipment 777 12/74 Bu. it was contracted at 60 cts. per bu.

It would have brought..... $466.29
In its damaged condition it brought 45½ cts. per bu..... 353.09

Loss to Compl'ts on 9th shipment..... $113.20

(See Ex. "H" to dep. of W. V. Moore Folio 3 page 1.)

10th shipment 651 11/74 Bu. it was contracted at 60 cts. per bu. (see same exhibits.)

It would have brought..... $390.68
In its damaged condition it brought 45½ cts per. bu.... 296.26

Loss to Compl'ts on 10th shipment..... $94.42

204 (See Ex. "I" to dep. of W. V. Moore Folio 3 page 1.)

11th shipment 525 50/74 Bu. it was contracted for 60 cts. per bu.

It would have brought	$315.40
In its damaged condition it brought 50½ cts. per bu.	265.42
Loss to Compl'ts on 11th shipment	$49.98

(See Ex. "J" to dep. of W. V. Moore Folio 3 page 1.)

12th shipment 518 Bu. it was contracted at 60 cts. per bu.

It would have brought	$310.80
In its damaged condition it brought 46 cts. per bu.	238.28
Loss to Compl'ts on 12th shipment	$72.52

(See Ex. "K" to dep. of W. V. Moore Folio 3 page 1.)

I have not reported any damages to Compl'ts on the 2nd and 4th shipments to-wit:

2nd shipment I. C. 12227.

4th shipment Car No. I. D. W. 17211 as these cars were shipped and en route in reasonable time. No. I. C. was en route three days, I. D. & W. No. 17211 was en route four days. It is in proof that from 3 to 5 days would be reasonable time.

(See dep. of M. L. Beeler Folio 2 page 7.)

The preponderance of proof seems to show that these two cars were damaged when they arrived at Birmingham, then if
205 the Railroad shipped them in a reasonable time and they were damaged when they arrived I don't think it would be liable for damages.

(See dep. of W. V. Moore Folio 3 pages 14-29 & 30.)

The Complainants through their agents tried to get the best price they possibly could for the corn (see folio 3 page 5.)

As to the 2nd head I report:

That the Southern Railway Company is liable for damages to Complainants in the total sum of $783.45 and interest on same from the time the corn should have been delivered to final judgment.

Interest on each car should be computed separately from five days after shipment to final Judgment.

(See dep. of W. V. Moore, Folio 3 pages 1 & 2.)

As to the 3rd head I report:

That the Southern Railway Company is liable for the expense Complainants incurred in sending W. V. Moore to Birmingham to look after and urge the delivery of said corn according to contract and expense of storage, loading and reloading and husking, etc. the sum of $225.00.

(See dep. of W. V. Moore, folio 3 page 4.)

The Southern Ry. Co. is also liable for interest on the $225.00 from arrival of W. V. Moore in Birmingham, interest should be

computed from last Thursday in Nov. 1902 being Thanksgiving day. (See folio 3 page 11.)

Respectfully Submitted

G. W. HOLTSINGER, *C. & M.*

March 9, 1905.

206 It is accordingly decreed that Complainant have and recover of defendant Southern Railway Company the sum of $1015.69, covering the damage suffered by the Complainant by reason of the detention of the corn until it was delivered at the warehouses of the Alabama Mill & Elevator Co. and other purchasers of the corn for all which, and the costs of the cause execution may issue.

From the foregoing decree and the decree heretofore pronounced holding it liable for damages accruing to the corn after it reached Birmingham, and while standing upon the yards, and adjudging that it was the duty of the Southern Railway Co. to deliver the corn at warehouses not upon its lines, the Southern Railway Company prays an appeal to the next term of the Supreme Court sitting at Knoxville, which is granted, it having given bond as required by law.

207 *Appeal Bond.*

May 9, 1905, bond filed, as follows:

We, the Southern Railway Co., principal, and J. A. Susong, surety, acknowledge ourselves indebted to Smith, Huggins & Co. in the sum of Two hundred and fifty Dollars, to be void on condition that the said Southern Railway Co. shall successfully prosecute an appeal to the next term of the Supreme Court of Tennessee, at Knoxville by it prayed from a judgment rendered against it in favor of the said Smith, Huggins & Co. in the Chy. Court of Jefferson County, on the 9th day of May, 1905, in the case of Smith, Huggins & Co. *vs.* it and the L. & N. Rd. Co.; or in case of failure to do so, pay and satisfy said damages and costs, and perform and satisfy the judgment of the Supreme Court in the premises.

SOUTHERN RAILWAY COMPANY,
By J. A. SUSONG, *Sol.*
J. A. SUSONG, *Surety.*

State tax	$2.50
County tax	2.50
C. & M. G. W. Holtsinger & Arthur Holtsinger:	
Pros. Bond 50¢, "O" Bill filed 25¢	.75
Sun. *ad res.* Maury Co. 75¢	.75
Copy of Bill to Maury Co. 1750 words $1.75	1.75
Sub. *as res.* Jeff. Co. 75¢, Copy of Bill Jeff. Co. $1.75	2.50
Ans. of L. & N. Ry. Co. filed 25¢, Ans. of So. Ry. Co. filed 25¢	.50
Filing Charter 25¢, 3 dockets 30¢, 3 orders of Court 75¢	1.30
Decree 75¢, Entering same 50¢, filing Exceptions 25¢	1.50
Report on reference 1250 words	12.50
Decree 75¢, Entering same $1.50, Bill of Cost 50¢	2.75
Sheriff A. Lichlyter: Summoning 1 Deft	1.00
D. S. C. I. Godwin " 1 "	1.00
D. S. D. M. Coile " 9 Witnesses	2.25
J. P. A. H. Webster Taking 3 Dep. $3.00, Subpœnas 65¢	3.65
N. P. J. L. Dillon " 1 Deposition	1.00
" " R. W. Hopper " 1 "	1.00
" " Alys Vigo " 8 "	8.00
" " J. H. Bundren " 2 "	2.00
Witness G. W. Long 1 day	1.00
" J. B. Huff 1 "	1.00
" E. F. Stollenwerck 1 "	1.00
" A. W. Richardson 1 "	1.00
" C. R. Trousdale 1 "	1.00
Amt. forward	$54.20
209–212 Brought forward	$54.20
Witness J. A. McDougal 1 day	1.00
" M. L. Beeler 1 "	1.00
" W. J. Dobbs 1 "	1.00
" J. Allen Durham 1 "	1.00
" F. P. Pelter 1 "	1.00
" W. V. Moore 2 "	2.00
" J. R. Wheeler 1 "	1.00
" C. P. Black 1 "	1.00
" B. M. Starks 1 "	1.00
	$64.20
C. & M. G. W. Holtsinger & Arthur Holtsinger, D. C. & M.	
Cost of Appeal, order granting appeal 25¢; appeal Bond 50¢; certificate & Seal 50¢; express 25¢; Transcript 65500 words $65.50	67.00
	$131.20

Certificate.

I, G. W. Holtsinger, Clerk and Master of the Chancery Court at Dandridge, certify that the foregoing is a full, true and perfect transcript of the record and bill of costs, remaining in my office, in the case of Smith, Huggins & Co. *vs.* Southern Railway Company and Louisville & Nashville Railroad Company.

Witness my hand, and the seal of said Court, this July 3, 1905.

G. W. HOLTSINGER,
Clerk & Master.

213 *Cost Bond.*

We Smith–Huggins & Co. principal, and J. B. Huff security, acknowledge ourselves indebted to Louisville & Nashville Ry. Co. in the sum of Two Hundred and Fifty Dollars.

But this obligation to be void if said Smith–Huggins & Co. which has obtained a Writ of Error from Supreme Court at Knoxville, Tennessee, from a decree rendered against it by the Chancery Court at Dandridge, Tennessee, in favor of L. & N. Ry. Co. in the cause of Smith–Huggins & Co. *vs.* Sou. Ry. Co. and L. & N. Ry. Co. at its May Term 1905, shall pay and satisfy all costs and damages that the said Supreme Court may adjudge against it in the cause.

July 22, 1905.

SMITH–HUGGINS & CO., *Principal.*
J. B. HUFF, *Security.*

214 *Writ of Error.*

State of Tennessee to the Sheriff of Knox County:

Whereas, Smith–Huggins & Co. having filed in the Supreme Court Clerk's Office for the Eastern Division of said State, at Knoxville, a certified Transcript of the Record in the case of Smith–Huggins & Co. *vs.* Southern Ry. Co. and L. & N. Ry. Co., recently determined in the Chancery Court of Jefferson County; and having entered into bond as required by law, and demanded a Writ of Error:

These are, therefore, to command you, the Sheriff as aforesaid, that you notify the said Louisville and Nashville R. R. Co. thereof, and that it be and appear before the Judges of our said Supreme Court, at Knoxville, on the second Monday of September next, then and there to show cause, if any there be, why the Judgment of the Court below, in said cause, should not be reversed or annulled; and have you then and there this writ.

Witness, Alex. McMillan, Clerk of our said Supreme Court, at office, in Knoxville, the second Monday of September, 1904.

ALEX. McMILLAN, *Clerk.*

Case assigned to Court of Appeals and is set for trial Wednesday, Aug. 10, 1905.

J. G. STUART, *Dep. Clerk.*

[Endorsed:] Writ of Error. Smith–Huggins & Co. *vs.* Southern Ry. Co. and L. & N. R. R. Co. Issued Aug. 4, 1905. Came to hand same day issued and executed as commanded, this Aug. 5, 1905. Bartow Smith, D. S.

215 Court of Chancery Appeals, at Knoxville, Tennessee.

MONDAY, *April* 3, 1905.

Be it remembered that at a regular term of the Court of Chancery Appeals, begun and held in the Court Room at Knoxville, Tennessee for the Eastern Division of Tennessee, on the first Monday in April, 1905, it being the 3rd day of said month, neither of the Honorable Judges of said Court being in attendance, Court was adjourned until tomorrow morning at 9 o'clock.

ALEX. McMILLAN, *Clerk.*
By J. G. STUART, *Deputy Clerk.*

TUESDAY, *April* 4, 1905.

Court met pursuant to adjournment, and neither of the Honorable Judges of said Court being present, Court was adjourned until tomorrow morning at 9 o'clock.

ALEX. McMILLAN, *Clerk.*
By J. G. STUART, *Deputy Clerk.*

WEDNESDAY, *April* 5, 1905.

Court met pursuant to adjournment, and neither of the Honorable Judges of said Court being present, Court was adjourned until tomorrow morning at 9 o'clock.

ALEX. McMILLAN, *Clerk.*
By J. G. STUART, *Deputy Clerk.*

THURSDAY, *April* 6, 1905.

Court met pursuant to adjournment, and neither of the Honorable Judges of said Court being presnt, Court was adjourned until tomorrow morning at 9 o'clock.

ALEX. McMILLAN, *Clerk.*
By J. G. STUART, *Deputy Clerk.*

FRIDAY, *April* 7, 1905.

Court met pursuant to adjournment, and neither of the
216 Honorable Judges being present, Court was adjourned until tomorrow morning at 9 o'clock.

ALEX. McMILLAN, *Clerk.*
By J. G. STUART, *Deputy Clerk.*

SATURDAY, *April* 8, 1905.

Court met pursuant to adjournment, and neither of the Honorable Judges of said Court being present, Court was adjourned until Monday morning at 9 o'clock.

ALEX. McMILLAN, *Clerk.*
By J. G. STUART, *Deputy Clerk.*

MONDAY, *April* 10, 1905.

Court met pursuant to adjournment, present and presiding the Honorable Judges R. M. Barton, John M. Taylor and S. F. Wilson.

The minutes of Saturday were read, when the following proceedings were had to-wit:

Court adjourned until Monday morning, April 17th, at 9 o'clock.

217 Court of Chancery Appeals, at Knoxville.

TUESDAY, *October* 3, 1905.

Court met pursuant to adjournment. Present and presiding the Honorable Judges S. F. Wilson, R. M. Barton and Joseph E. Jones.

The minutes of yesterday were read and signed, when the following proceedings were had, to-wit:

SMITH-HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY and LOUISVILLE & NASHVILLE RY. CO.

Modified, Remanded and Appealed.

This cause came on to be heard before the Honorable Court of Chancery Appeals upon the transcript of the record from the Chancery Court of Jefferson County and upon the assignments of error, and briefs of counsel.

And therefore the cause was determined by the Court of Chancery Appeals and its written opinion and findings of fact is filed herewith as part of the record and ordered to be attached to the transcript.

And the Court is of the opinion that there was error in the decree of the Chancellor in so far:

I.

As he adjudged the defendant Southern Railway Company to be liable for any part of the damages to the corn shipped by complainant which accrued after its arrival upon the delivery tracks of said Southern Railway Company in Birmingham; and after notice to consignees of its arrival.

II.

As he adjudged that the defendant Louisville & Nashville Railroad Company was not liable for damages suffered by said corn after its arrival in Birmingham and while it was in the yards prior to being unloaded.

218 This Court is of the opinion that the Southern Railway Co. is only liable for such portion of the damages as accrued by reason of the delay in transition of the cars shipped, which is fixed by the concurrent finding of the Master and Chancellor at forty per cent. of the entire damages.

This Court is further of the opinion and decrees that the Louisville & Nashville Railroad Company is liable for sixty per cent. of

the damages reported by the Master being the per cent. of damages which accrued while the corn remained un-delivered in the yards at Birmingham. It is accordingly adjudged and decreed that the complainant Smith-Huggins & Co. have and recover of the Southern Railway Company the sum of $406.28, being forty per cent. of the damages found by the Chancellor together with interest thereon from the 8th day of May, 1905, the date of the Chancellor's decree making a total recovery against the Southern Railway of $415.84.

And complainant Smith-Huggins & Co. will have and recover of the defendant Louisville & Nashville Railroad Company the sum of $609.42, being sixty per cent. of the recovery awarded by the Chancellor together with interest thereon from the 8th day of May, 1905, making a total recovery against the Louisville & Nashville Railroad Company of $623.73.

And the defendant Southern Ry. Co. will pay forty per cent. of the costs accrued upon this appeal and the defendant Louisville & Nashville Railroad Company will pay sixty per cent. of the costs accrued upon this appeal and L. & N. will pay the costs of the writ of error; each defendant will pay the costs below accrued in its behalf, and the decree of the Chancellor in so far as he adjudged the entire costs of the lower Court against the Southern Railway is reversed.

For all of the above recoveries execution may issue.

From the foregoing decree of the Court of Chancery Appeals, in so far as it holds the Louisville & Nashville Railroad Company liable for the damages or any portion thereof, which accrued
219 in the yards at Birmingham and in holding it bound for any portion of the costs of the cause, the defendant, Louisville & Nashville Railroad Company prays an appeal to the Supreme Court, which is granted.

The Court filed its written opinion in this cause which is attached to the transcript and made a part of the record.

220 SMITH-HUGGINS & COMPANY

vs.

THE SOUTHERN RAILWAY COMPANY and THE LOUISVILLE & NASHVILLE RAILROAD CO.

Jefferson County Equity.

Opinion.

Filed Sept. 20, 1905. J. G. Stuart, D. C.

The bill in this case was filed October 17, 1903, by the complainants, a domestic corporation of this State against the defendant Railroad Companies, to recover a decree against them or either of t-em, for the difference in the value of a lot of corn shipped at several different periods, at the time of its shipment and when it was delivered.

Without going into details, the complainant avers that it delivered the corn to the defendant, the Southern Railway, in the town of Jefferson City, Tennessee, at different dates stated, consigned to parties in Birmingham, Alabama, and that this corn was to be shipped in good order, and under a contract of shipment that said defendant would deliver said corn at its destination in a reasonable time, and that this shipment was made upon a valuable consideration passing from complainant to it.

The bill sets out the dates of the various deliveries of corn to the Southern Railway for shipment to Birmingham, Ala., and then alleges that, the defendant-, the Southern Railway and the Louisville & Nashville Railroad Company, at the time of the delivery of said several quantities of corn, were made with common carriers of goods and chattels for hire, and that The Southern Railway
221 Company being the receiving and initial carrier, and the one with which the contracts of shipment were made, the other defendant being the connecting and ultimate carrier, was bound by the contracts made with The Southern Railway Company, and the law relative to common carriers, to receive the said several cars of corn forwarded and deliver them to the consignees at their destination.

It is further averred, that at the time said several contracts were made, the defendant Southern Railway Company was notified by the shipper or consignor, that the product shipped was perishable in its nature, and was early fresh corn gathered for and sold on an early market, and that it must be carried and delivered without delay or it would heat and damage and rot, and that if delivered in this condition it would not be received at the price for which it had been sold, and that it would be practically worthless.

It is further averred, that this fact was fully explained by the consignors to the defendant at the time, and that it fully understood it, and that notwithstanding this fact, and that the defendant- agreed and were bound to carry and deliver the corn at its destination in good order and in a reasonable time, one or both of them breached the said several contracts of shipment in, that they, or one of them, wrongfully, carelessly and negligently, delivered the shipment of said several cars of corn after an unreasonable time, and failed and refused to carry the said several cars of corn in good order and in a reasonable time as contracted for and as they were bound to do, whereby the corn was greatly damaged and heated, and was injured and was almost a total loss to the complainants, and whereby complainants on account of said breaches of the contract of shipment, were put to great expense in caring for and in selling said corn in its damaged condition, and whereby complainants lost the price and profits on said corn occasioned by the unreasonable delay
222 and negligence of defendants in transporting the same.

The prayer of the bill, is sufficiently indicated in the opening paragraph of this opinion.

The Louisville & Nashville Railroad Company and the Southern Railway Company filed separate answers.

The Louisville & Nashville Railroad Company answering says: that it knows nothing about the contract for the shipment of corn

over the Southern Railway Company, and denies that it was bound by the alleged contracts of complainants with said Company.

It also denies that it was bound by law to receive said car loads of corn alleged to have been shipped and forward and deliver them to their ultimate destination in good order and in reasonable time.

It further more said, it had no knowledge of any notification given by complainants to the Southern Railway Company as to the alleged immature condition of the corn and its perishable nature.

It denies that it ever made any contract of any character with complainant- respecting the delivery of said corn to anybody.

It says that it has no knowledge concerning the damaged condition of said corn caused by the delay in its delivery but says, if said allegation is material to its rights, it calls for strict proof thereof.

The Southern Railway answered denying any liability on its part, and avers that it shipped with- a reasonable time and promptly, corn delivered to it for shipment, and turned it over to the proper connecting carrier, and avers that under its contract to ship said corn, it was not liable for any damage that may have resulted to it after it had carried it to the end of its line. In other words, its insistence in its answer is, that it fully complied with its contract of shipment made with complainants.

223 Quite a volume of proof was taken in the case, and there was an agreement of counsel covering several matters relative to proof.

The cause was heard by the Chancellor December 31, 1904. He decreed:—

1st: That as between complainants and the defendant Louisville & Nashville Railroad Company, there is no liability on the part of the latter, and the rights of defendants Railway Companies, growing out of the transactions involved as between them, need not be determined in this case.

2nd: That the defendant, the Southern Railway Company, by its contract undertook to transport the freight mentioned with reasonable dispatch, and to deliver the same according to its custom, at the ware-house of the A. M. & E. Company on the siding of the Louisville & Nashville Railroad Company, Birmingham, Alabama, and that nothing shown in its defense herein, excuses it from so doing, that it had previously done *sp far* these same shippers, and that its custom was to solicit and receive the freight for shipment to be delivered as aforesaid, and that complainants having contracted with said defendant, and relied upon such custom, it cannot complain (its private arrangement with the said Louisville & Nashville Railroad Company having failed), and say that a delivery on its own siding or at its own depot, was a delivery at Birmingham within the meaning of said contract.

3rd: That the suit, therefore, be dismissed as to the Louisville & Nashville Railroad Company, and that the Southern Railway Co. be held liable for such damages accrued to complainants by reason of the breach of said contract in failing to deliver the cars of corn in question within reasonable time at the ware-house of said Alabama Mill & Elevator Company in Birmingham, Alabama, and that the measure of damages *are* the difference in the market value of said

corn, if delivered acording to contract, and its market value as and when delivered.

224 His Honor further held that because some of the cars of corn appeared to have been carried to Birmingham within a reasonable time, and yet when they arrived, were in a damaged condition, and would therefore have been damaged if delivered promptly according to the contract, he was not under the proof as it then appeared, satisfied to fix amount of damages to be recovered, and thereupon his Honor referred the cause to his Master to report from the proof on file and such other proof as might be offered:—

1st: How much was *nay* of said cars damaged in transit, allowing a reasonable time therefor?

2nd: What was the total damage thereto and how much is the defendant, the Southern Railway Company liable for under the holding of the Court herein?

The Master was directed to report as to any other point that seemed to him proper and necessary.

The Master submitted an elaborate report March 9, 1905.

He sets out the various dates of the shipments of corn, the price at which it was sold, and the price received for it, and the damage sustained.

There are exceptions to this report.

The cause came on for hearing before Chancellor Haynes upon the report and the exceptions thereto, and after the Master had amended his report so as to show the per cent. of the damages suffered by the corn in transit, certain of the exceptions were sustained and the others over-ruled.

The result of his holding was, that a decree was rendered against the Southern Railway Company for $1015.69 and the costs.

From this decree of the Chancellor, said defendant Company prayed and was granted an appeal to the Supreme Court.

From his decree dismissing the bill as to the defendant the Louisville & Nashville Railroad Company, the complainant has

225 brought the case up by writ of error.

The defendant, the Southern Railway Company, assigns the following errors:—

1st: The Court erred in finding that it undertook to deliver the cars of corn in question at any other point than on its own delivery tracks in Birmingham, Alabama.

2nd: The Chancellor erred in holding that it by any private arrangement with the Louisville & Nashville Railroad Company, was bound for any default of the latter in handling the freight, and it is insisted that his finding that there existed a private arrangement between the two companies, which in any way bound the Southern Railway Company to place the cars in question at any point upon the Louisville & Nashville tracks, is wholly without support in the record, and his Honor should have found that the Southern Railway Company was in no way liable for any of the damages suffered by the corn after its arrival at Birmingham, Alabama, and that, at most, it was only liable for such damage as occurred from delivery in transit, the amount of which under the proof was trifling.

Complainant- under its writ of error assigns as error the action of the Court in holding that there was no liability on the part of the Louisville & Nashville Railroad Company for any portion of the liability for damages suffered, and in refusing to hold that it was clearly liable, either jointly with the Southern Railway Company, or alone, for all that portion of the damage suffered by the corn while not standing in the yards at Birmingham.

The central and controlling facts in this case are not in serious dispute.

The corn in question was shipped by complainants at the different periods specified in the report of the Master.

There is no controversy as to the quantity of corn shipped.

226 The contract of shipment was made with the Southern Railway.

The bill of lading under which this car was shipped contains the following clause, designated as clause 10.. It is as follows:—

"This bill of lading is signed for the different carriers who may engage in the transfer severally but not jointly, each of which is to be bound by and have the benefits of the provisions thereof, and in accepting this bill of lading, the shipper, owner and consignee of the goods and holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, whether printed or written."

It contains also the following provision:—

"No carrier shall be liable for loss or damage not occurring on its portion of the route, not after said property is ready for delivery to consignee. The amount of any loss or damage for which any carrier becomes liable, shall be computed at the value of the property at the place and time of shipment under this B/L, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of such events, such lower value shall be the maximum price to govern such computation."

Now, it appears that the Louisville & Nashville Ry. denies any liability for its refusal to receive corn shipped over the Southern Railway after its arrival at Birmingham and deliver it over its terminal tracks to the American Mill & Elevator Company, to whom the corn had been sold.

Of course, this denial is predicated upon the idea that it was not a connecting carrier in handling the shipments of corn involved in this case, or that it was under any obligation respecting the same.

Under the report of the Master 40% of the damages resulting to this corn accrued on account of the negligent delivery of the

227 Southern Railway in transporting it to Birmingham, and that 60% of the damage found by the Master accrued after the arrival of the corn at Birmingham.

The Chancellor concurred in the report of the Master as to the per cent. of the damages accruing while the corn was being shipped by the Southern Railway.

This concurrent finding of the Chancellor and Master is based upon material evidence in the record, and, of course, is conclusive.

The only question open before us for consideration is as to whether the Southern Railway alone, or said railway and the Louisville & Nashville, are jointly liable for the other 60% to complainants, or

whether the Louisville & Nashville alone is liable to complainants therefor.

The amount of damages found by the Master is not seriously questioned.

The contention of complainants under the writ of error is that the Chancellor erred in holding that the Louisville & Nashville Railroad Company was not liable for any part of the damages suffered, and the contention of complainants is that, it was clearly liable either jointly with its co-defendant or alone, for all the damages suffered by the corn while standing in the yards at Birmingham.

The complainants made the contract for the sale and shipment of the corn to W. C. Davis & Company, and at this time the Southern Ry. Company were placing such shipments as they were requested to place upon the spur track of the Louisville & Nashville Railway Company, the latter Company being accustomed to receive and to move them to places where they were to be unloaded.

This appears to have been the arrangement when the shipments of corn involved in this case were made and the corn was sold, and Davis & Company bought in view of this arrangement be-
228 tween the Railroad Companies, and under the idea that it would be continued.

The proof shows that the corn was freshly gathered, that it was perishable and liable to heat and become damaged if unnecessarily detained in the cars.

The proof reasonably shows that both Companies had notice of the necessity of the prompt handling and unloading of this corn, and the Louisville & Nashville Railroad Company was constantly pressed to receive and move the cars containing this corn to destination on their spur tracks or terminals.

Davis & Company refused to accept the corn because of its non-delivery until the corn was too badly damaged to handle.

The result was, that complainant was compelled to sell it at loss and for the best price obtainable.

The Louisville & Nashville R. R. Co. owned the side tracks reaching the ware-house where this corn was to be unloaded, and over these tracks it had been its custom for years to receive and handle all such cars loaded with freight as were tendered to be placed at ware-houses upon its lines in the city of Birmingham, and until about the time, or just before this corn reached Birmingham, it appears from the proof, that it was a part of its business and a daily occurrence to receive and remove such cars of freight.

Indeed, it appears from the proof, that the receiving and handling of cars loaded with freight from point to point upon its terminal lines or spur tracks within the City of Birmingham, was a regular part of its business as much so as its general railroad business.

It appears that the defendant Louisville & Nashville R. R. Co. placed an embargo upon the receipt or handling of such cars Nov. 13, 1902, after the complainants had contracted to sell the car loads of corn involved here, and after most of them were shipped.
229 As before stated, previous to this embargo, the defendant Louisville & Nashville R. R. Company received cars of freight to be transferred to ware-houses, elevators, and placed of business

located upon its side or spur tracks within the City of Birmingham, Alabama, from all persons offering them and without discrimination.

For this service it received compensation.

The contention of the Louisville & Nashville R. R. Co., reduced to its simplest statement, is, that it was not bound to receive these cars or corn and place them.

This insistence on its part rests upon the proposition that, in the matter of handling the cars of other roads in its yards or over its spur tracks, it was not a common carrier, but simply a private carrier, and that this being so, it had the right to refuse to receive and handle these cars, and as a corollary to this proposition, that it had the right to discriminate between freight arriving in Birmingham over its lines, and freight arriving over other lines, and could give preference between those that it chose to serve in this business.

The contention of complainants under their writ of error, is, that, with respect to this business at Birmingham, it was not strictly a private carrier, but that by its custom and course of dealing, by holding itself out as ready and willing to handle such freight upon its spur tracks and terminals within the City and by soliciting the same, it attached to itself, with respect to such business, the character and liability of a common carrier.

We are of opinion that the Louisville & Nashville R. R. Co. in consequence of accepting and performing the business of handling cars of freight over its spur tracks and terminal lines in the City of Birmingham and delivering them to ware-houses, elevators, and places of business on its said line, and in consequence of its soliciting such business, assumed with respect thereto the character of
230 a common carrier, and, hence, incurred the duties and liabilities of such character.

The Railway Company *vs.* Railway Company 109 Ill. 135.

This case is a well reasoned one and sustains the proposition stated.

See also Avinger *vs.* Railway Company 29 S. C. 265.

13 Am. St. Reps. 716.

Publishing Company *vs.* Southern Ry. Co. 110 Tenn. 684.

In the Tennessee case just cited, it is said:—

"The criterion by which it is generally determined whether one is a common carrier is, that he has held himself out as such, or has advertised himself in his dealings or course of business with the public as being ready and willing for hire to carry particular classes of goods for all those who may desire the transportation of such goods between places on its lines. If he does so, he is regarded in law as a common carrier."

The principle is announced in various other cases, and we think it is sound and well sustained in reason.

The result is, that we are of opinion that the Louisville & Nashville Railway Company was bound by virtue of its previous course of business to accept these cars of corn and deliver them to their destination on its terminal or spur tracks, and that by reason of its failure to do so, it is liable for all damages resulting from its failure, as the report

of the Master shows the amount of damage to the corn while in transit and under the control of the Southern Railway and while it remained in Birmingham undelivered because of the failure of the Louisville & Nashville Railway to deliver it, both Companies are liable to complainant-, and we think that each Company is responsible for the amount of damages reported by the Master, that is, that the Southern Railway Company is responsible for 40% of the damages, and the Louisville & Nashville Railway for 60% of the
231 damages, reported by the Master, and a decree will be entered here accordingly.

The cost of the cause below, and of the appeal, and the writ of error, will be apportioned upon the same basis, that is, the Southern Railway will pay 40% of the cost and the Louisville & Nashville 60 per cent. thereof.

S. F. WILSON, *Judge.*

The other Judges concur.

232 In the Court of Chancery Appeals at Knoxville, Tennessee.

—.

SMITH–HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY CO. ET AL.

Jefferson County.

Petition of Respondent Louisville & Nashville Railroad Company for Addition- Findings of Fact and for a Rehearing.

Filed Sept. 26, 1905. J. G. Stuart, D. C.

Your petitioner, Louisville & Nashville Railroad Company, respectfully represents unto your Honors that it is greatly aggrieved by the Opinion and Findings of Fact in this cause in that your Honors have inadvertantly failed to find the following facts:

1. That the corn was shipped from various East Tennessee points by Smith-Huggins & Company, on local Southern Railway Company bills of lading, and consigned to themselves at Birmingham, Alabama, the entire haul being over the line of the Southern Railway Company, and for delivery in the depot, or on the delivery tracks of the Southern Railway Company in Birmingham, said Southern Railway Company having a depot and terminal facilities of its own at that point; and that the written contract with the Southern Railway Company did not provide for delivery at any other point than at the depot or delivery tracks of the Southern Railway at Birmingham.

(Trans. pp. 19 *et seq.*)

2. That Smith-Huggins & Company had contracted to sell this corn to W. C. Davis & Co., brokers of Birmingham, Alabama,
233 who had no established place of business, but merely sold the corn as it arrived over the delivery tracks of the Southern

Railway Company in Birmingham, to various customers in and around Birmingham, and that the corn at the time of its arrival in Birmingham had not been sold to the Alabama Mill & Elevator Company, nor was it contemplated by Smith-Huggins & Company at the time it made its contract with W. C. Davis & Co. that the corn should be delivered to the said W. C. Davis & Co. at the ware-house of the Alabama Mill & Elevator Company on the switch tracks of the Louisville & Nashville Railroad Company in Birmingham; but, on the other hand, it was sold for delivery to W. C. Davis & Co. upon the delivery tracks of the Southern Railway Company at Birmingham, from which point the said W. C. Davis & Co. intended to distribute it to its various customers.

We quote from the testimony of J. ALLEN DURHAM, President & Manager of the Alabama Mill & Elevator Co.:

"These cars were bought, as I now remember, through W. C. Davis & Company. None of these cars were bought until after its arrival here. W. C. Davis & Co. are grain brokers, and have corn shipped to Birmingham and sell it from the tracks, but I do not know how they get it."

(Trans. p. 123.)

We quote further from the testimony of W. J. DOBBS, a member of the firm of W. C. Davis & Co.:

"Davis & Company sold to other parties. They were grain brokers. We undertook to keep no stock on hand. We were accustomed to sell from the car. The greater part of this corn was sold to the Alabama Mill & Elevator Co. The place of delivery was their Mills on the L. &. N. track."

(Trans. p. 135.)

3. That the first three car loads of corn arrived in Birmingham in a damaged condition, having become heated while moving
234 over the Southern Railway, and that immediately thereafter Davis & Company cancelled their contract with Smith-Huggins & Co.

We quote from the testimony of W. V. MOORE, a member of the firm of Smith-Huggins & Co.:

"Q. When did W. C. Davis & Co. breach their contract with S. H. & Co.?

Ans. They would not accept the corn when they found the corn was damaged.

Q. 8. How many of these cars had arrived in B'ham when you first went there?

Ans. I think about three.

(Trans p 72.)

"Q. Did they notify you before you went to Birmingham that they would not receive any further shipments of corn?

A. They notified us that they would not receive the corn in a damaged condition."

Q. Was that after the three cars, I. C. 12227, I. D. & W. 17211 and Sou. 32600 had reached Birmingham?

A. Yes sir.

When I arrived in Birmingham W. C. Davis & Co. would not accept the corn in the condition it was."

(Trans. pp 72 to 76.)

4. That in addition the market price of corn had dropped to 55c and 56c per bushel, so that W. C. Davis & Co. were very anxious to cancel their contract, as they had agreed to pay 61c per bushel.

W. J. DOBBS, a member of W. C. Davis & Co., says:

"The market opened early in the season at 61 cents; We sold several of the cars for prompt delivery at 60 cents. The market declined later to 56 and 55 cents. The market ranged about 55 during the season."

(Trans p 136)

235 5. That the corn was taken from the fields before it had matured and was sappy, causing it to heat rapidly and spoil.

(Trans p 163.)

6. That immediately upon the cancellation of the contract by W. C. Davis & Co., Smith-Huggins & Co. sent W. V. Moore, a member of the firm, to Birmingham, to dispose of the corn, Moore going to Birmingham about November 22nd.

(Trans pp 72 to 76.)

7. That the Louisville & Nashville Railroad Company had on November 13th notified the Southern Railway Company and all other connecting lines in Birmingham that beginning on November 14th it could not do switching service for any of them to industries upon its own tracks; and that Mr. Moore after he arrived in Birmingham was repeatedly told by Clerks in the Superintendent's office of the Louisville & Nashville Railroad Company that on account of the congested condition of its yards it could not handle the corn to ware-houses or industries on its own lines with any degree of dispatch, and could not assure him when they could handle the same.

(Trans. pp 72 to 76.)

8. That after Mr. Moore arrived in Birmingham, not being able to induce W. C. Davis & Co. to accept the corn because it was daily arriving in a damaged condition over the Southern Railway, he started out to sell the corn as the property of Smith-Huggins & Co., to anyone in Birmingham that he might be able to sell it to. He sold some of it to one party and some to another, but sold the greater portion of it to the Alabama Mill & Elevator Co., but he did not make this sale to Alabama Mill & Elevator Co. until W. C. Davis & Co. had refused it on account of its damaged condition on arrival over the Southern Railway in Birmingham, and until he
236 (Moore) himself had reached Birmingham, and that Alabama Mill & Elevator Co. bought it, paying the prevailing market price therefor.

(Trans. p 123.)

9. That Smith-Huggins & Co. shipped A. G. S. car #4044, on which they claim a damage of $103.32, C. & E. I. car #450 on which they *cal*im a damage of $82.52, after the complainants Smith-Huggins & Co. had been notified of the cancellation of the contract by W. C. Davis & Co.

(Testimony of W. V. Moore, Trans. pp 84 to 95.)

10. That the tabulated statement hereto attached, marked Exhibit "A" contains the correct car numbers, places of shipment, dates of shipment, dates of arrival of the cars in Birmingham, date of notice to the consignees by Southern Railway Company, dates that the freights were paid to Southern Ry. Co., dates that the Louisville & Nashville Railroad Company agreed to switch eight of the cars in controversy to the Alabama Mill & Elevator Co., dates of the deliveries, and the loss claimed, it being desired that this Court should find this to be a statement of the correct dates and correct facts in tabulated form for convenience in the hearing of this cause, and because of the necessity for so finding in order that the rights of this respondent may be properly determined.

11. That the "Transfer Track" for the transfer of freight from the Southern Railway Company to the Louisville & Nashville Railroad Company in Birmingham, and from the Louisville & Nashville Railroad Company to the Southern Railway Company, was the property of the Southern Railway Company.

(Trans. pp 170 to 196.)

12. That these cars in controversy were never placed on the tracks of the Louisville & Nashville Railroad Company until the congestion in its own Yards was relieved, to-wit, on December 6th 1902, on which date they were accepted for transfer by the said Louis-
237 ville & Nashville Railroad Company, and immediately placed at the Ware-house of the A. M. & E. Co., said cars of corn being on that date purchased by the A. M. & E. Co. from Smith-Huggins & Co.

(Trans pp 102-3 & 121.)

13. That this corn could have been drayed from the cars to the ware-house of the Alabama Mill & Elevator Co., but this plan was objected to merely because of its inconvenience.

Mr. DOBBS, of W. C. Davis & Co., says:

"The Alabama Mill & Elevator Company's ware-house would have been about three blocks from the Southern side track. I would have had to sack in sacks, truck it through the warehouse of the Alabama Mill & Elevator Co., and then deliver it to the sheller; the sheller is at the rear of the ware-house. I suggested that plan to Mr. Durham of the Alabama Mill & Elevator Co., but he would not agree to it because it was so much trouble, and interfered with their shipping."

(Trn. pp 135-6.)

14. That when these various cars of corn arrived in Birmingham, consigned to Smith-Huggins & Co., they were placed upon the "team

track" of the Southern Railway Company, being the usual point of delivery, and the consignees, Smith-Huggins & Co., promptly notified.

(Trans pp 102-3 & 105.)

That the Court set out in full from the evidence, which is uncontradicted, the conditions which were unusual and exceptional, and which caused the embargo to be laid by the Louisville & Nashville Railroad Company against this switching, the conditions being fully stated by Superintendent Starks, Assistant Superintendent Wheeler and Train Master Stollenwerck, as follows:

"On November 13th 1902, I notified the Superintendent of each and every connecting line at Birmingham, Alabama, that
238 taking effect on November 14th 1902, at noon, the Louisville & Nashville Railroad Company would, until further notice, decline to receive business from their respective lines for delivery on switching tracks within the limits of Birmingham except perishable freight and pac*h*age cars destined to our freight house. What was meant by perishable freight in the notice referred to, would be such freight as green vegetables, fresh meat, poultry, or such other freight as might be traveling under refrigeration."

(Trans. pp. 142-143.)

The copy of notice is exhibited at Trans. page 154. With reference to reason of embargo he says:

"To the best of my recollection various consignees located on tracks which we switched at Birmingham, were at that time receiving such an unusually large quantity of car load business, both over our rails and connecting lines, which were turned over to us for placing on tracks we switched, that they were not able to relieve cars promptly enough after they were placed and continue this process rapidly enough to furnish track space at their respective locations for the placing of their business on arrival, and when it could not be so placed it was necessary for the cars to be held back in storage in other portions of the yard, thereby congesting those tracks and bringing about a congestion, and in order to avoid having the congestion become more aggravated or more extensive, it was necessary to place an embargo on this switching business coming from other lines until the accumulated freight referred to above was disposed of, so that business might proceed in its regular way at the usual unloading places as it was received from the connecting lines and not make it necessary to provide storage places for it as described in the foregoing; otherwise the blockade would have continued indefinitely, or so long as shipments arrived in unusual large quantities, as was the case at that particular time.

(Trans. pp. 143-144.)

239 Mr. Wheeler, the Assistant Superintendent of the Louisville & Nashville Railroad Company, at Birmingham, Ala., gives reasons for this embargo as follows:

"There was an embargo placed by the Louisville & Nashville Rail-

road Company on the 14th day of November 1902, against all lines entering Birmingham. This embargo was placed on account of the congested condition of the Birmingham yards of the Louisville & Nashville Railroad Company with inbound business consigned to various consignees on the various tracks to such an extent that the inbound business could not or was not being unloaded as fast as it was received, and on that account business that was received had to be held in storage tracks outside of the unloading yards proper, until room could be had on unloading tracks to accommodate same. Notice of this embargo was given to each superintendent of every railroad entering Birmingham, and the notice given was that the Louisville & Nashville Railroad Company would on November 14, 1902, at noon, decline to receive from them car load business to be handled within the switching limits of Birmingham, except perishable freight and cars containing package freight for our house. By perishable freight was meant such freight as green vegetables, fresh meat, poultry, or such other freight as might be traveling in refrigeration. The superintendent of the Southern Railway Company was notified at the same time all other superintendents whose roads entered Birmingham were notified. We handled all cars that we were able to handle for each and every road during that time. As I recall it now, the yards of all the railroads at Birmingham were congested at the time this embargo was placed. This embargo was due to the extraordinary amount of car load freight being handled at that time by all of the railroads entering Birmingham. This embargo was placed against all of the railroads with whom the Louisville & Nashville Railroad did business at that time, which was all the railroads entering Birmingham, as affiant now remembers. The various consignees located on tracks to which we switched in
240 Birmingham, which consignees included the Alabama Mill & Elevator Company, were during that time receiving such an extraordinary amount of car load freight, both over the rails of the Louisville & Nashville and their connecting lines, which business was turned over to us to be switched to warehouses of consignees on our tracks, that the consignees were not able to relieve cars promptly enough after they were placed to them on track to their warehouse, to enable empties to be pulled out and additional loads placed, and to continue this process rapidly enough to furnish track space at their respective locations for the placing of their business on arrival. When consignees did not have such room it was necessary for the cars to be held back in storage in other portions of the yard, which congested those tracks, thus causing a congestion, and it was in order to prevent the congestion becoming more extensive that this embargo was placed against the switching of cars coming from other lines, until the accumulated freight was disposed of. Had not this embargo been placed the congestion would have become so extensive that the blockade would have continued indefinitely, or so long as shipments arrived in unusual and extraordinary large quantities as was the case at the time the embargo was placed. The Alabama Mill & Elevator Company advised during this embargo that they had arranged to cancel orders on those lines connecting

with the Louisville & Nashville Railroad and over which they had been receiving shipments of car and other corn, for future shipments of ear corn, or other corn, until we would advise them that we could again commence handling the switching traffic as between their plant and the connecting lines at Birmingham. We get two dollars per-car for switching shipments from connecting lines at Birmingham to industries located within switching limits of Birmingham. On January 7, 1903 we resumed the inter-line switching business, as between all the lines at Birmingham, the same as before this embargo was placed on same, except that we did not receive this traffic faster than consignees could unload it promptly, as we could not
241 undertake to receive it and stand it on the hold tracks, or on our yard tracks, where it would interfere with the handling of through traffic. It was my understanding that the Southern Railway Company's yards were blocked at the same time we had this embargo placed.

(Tr. pp. 148, 149, 150 & 151.)

Mr. E. F. STOLLENWERK says:

"The terminals and equipment of the Louisville & Nashville Railroad were sufficient and adequate under ordinary circumstances and conditions.

To the 4th Inty: Ordinary conditions and circumstances did not prevail at the time said shipments arrived at Birmingham from Smith, Huggins & Company. The yards of the Louisville & Nashville Railroad Company, at Birmingham, during the months of September, October, November and December of 1902 were badly congested on account of the unprecedented business originating on their line. The Louisville & Nashville Railroad in the Birmingham District was amply supplied in every way with facilities for the transportation of freight and the handling of same at its terminals under ordinary circumstances. It had sufficient equipment for ordinary purposes and under ordinary circumstances and was able to carry goods with expedition under ordinary circumstances and conditions.

To the 5th Inty: The terminals and equipment of the Louisville & Nashville Railroad for handling freight were sufficient under ordinary circumstances and conditions, not only for handling all traffic originating on its own line, but were sufficient for the proper and speedy switching of the cars of other roads in the Birmingham district, but on account of the unprecedented traffic originat-
242 ing on the Louisville & Nashville Railroad Company's own line at the time these cars covered by this law suit arrived in Birmingham the Louisville & Nashville Railroad was neither able to handle the traffic originating on its own line nor was it able to switch the cars of other railroads coming into the Birmingham District."

(Tr. pp. 192-193.)

16. That the notice of the embargo given to other Railroads in Birmingham is in the following words, to-wit:

"BIRMINGHAM, ALA., *Nov.* 13, 1902.

"Mr. M. M. Richy, Sup't, Southern Railway Co., City.

"DEAR SIR: This is to notify you that, taking effect at noon tomorrow, November 14th, we will, until further notice, decline to receive business from you for delivery on switching tracks within the switching limits of Birmingham, except perishable freight and package cars for our house. Please instruct your agents accordingly.

"Yours truly,

B. M. STARKS,
Superintendent."

(Trans. p. 145.)

17. That Mr. Moore, representing Smith-Huggins & Co., was notified as soon as he reached Birmingham that it was impossible for the Louisville & Nashville Railroad Company to handle these cars of corn, and that he knew it before he re-sold this corn to Alabama Mill & Elevator Co., and he made the sale to the Alabama Mill & Elevator Co., fully aware of the local conditions at that point and the inability of the Louisville & Nashville Railroad Company to handle it,
243 and in the face of the positive refusal of the Louisville & Nashville Railroad Company to accept the cars for switching.
(Testimony of Moore, Tr. pp. 75 to 83.)

And that Mr. Dobbs, who, after the refusal of W. C. Davis & Co. to accept the cars, turned in and assisted Mr. Moore in re-selling the corn for Smith-Huggins & Co., also had full notice of the congested conditions at that time.

(Trans. pp. 132 & 134 *et seq.*)

18. That there were other ware-houses for grain on the tracks of other Railroads in Birmingham, and especially that another firm known as G. H. Davis & Co. have a ware-house on the tracks of the Central of Georgia Railroad, and that a part of the cars were switched by the Central of Georgia Railroad to the ware-house of G. H. Davis & Co. (Trans. p. 136). There was no reason why Smith-Huggins & Co. could not have stored all of the corn immediately after its arrival in Birmingham over the Southern Railway, and after its refusal by W. C. Davis & Co., in this ware-house on the Central of Georgia Railroad's switching tracks or in some other ware-house in Birmingham on some other road.

Mr. DOBBS, of W. C. Davis & Co., says:

"The Central of Georgia moved five or seven cars to the G. H. Davis & Co. ware-house for me of this Smith-Huggins & Co. shipment. It was necessary to do this, as by so doing he saved it in a somewhat damaged condition."

(Trans. p. 136.)

19. That the Court set out in full from the evidence of the witness, F. P. Pelter, which is uncontradicted, the conditions under which these cars arrived in Birmingham over the Southern Railway, and

under which the interchange of switching business was carried on between the two railroads.

The witness PELTER says:

"The delay shown to these cars between the date of notice to the consignee and the date of delivery to connecting line, or
244 rather the date freight was paid and cars were ordered, was caused by the consignee not accepting these cars on our team or delivery tracks, but desiring them to be delivered to the L. & N. R. R., which line would not accept them on account of the embargo they had put on cars from other lines for delivery on their tracks at Birmingham. We were at all times ready and anxious to make delivery of all of these cars on our team or delivery track from the moment they arrived at Birmingham, but the consignees were not disposed to accept this delivery. The dates shown in this statement as the date delivered to L. & N. is the date on which these cars were placed on the track on which we make our deliveries to the L. & N. R. R., and from which they accept deliveries.

We were also in a position to deliver these cars to the L. & N. R. R. on any day that their transfer was open and they would accept them from us. On account of the congested condition of the L. & N. yard at this time they did not at all times have the track on which we deliver cars to them open so that we could make deliveries to them. An embargo was placed by the L. & N. at noon November 14, 1902, on business for delivery on switching tracks of the L. & N. R. R. within the switching limits of Birmingham. By the embargo they refused to receive cars for delivery to industries located on their line in Birmingham. This embargo continued from November 14, 1902, until January 7, 1903. Mr. Dobbs had heretofore called on me, and stated that he would have paid freight and ordered cars at an earlier date had it not been for the embargo placed by the L. & N., and I presume that this statement would also cover the cars in this shipment. This embargo was raised and lowered during the time that I have mentioned, and while raised deliveries were made to the L. & N. as shown in my statement giving the time of deliveries.

After the arrival of the cars upon the Southern tracks at
245 Birmingham, consignees were promptly notified that we were ready to make delivery on payment of freight charges. There was no delay occurred in the delivery of these cars by reason of any inability or unwillingness on the part of the Southern Railway Company. Since my connection with the Southern Railway Company, which was in August 1902, it has been customary for one line to switch cars for a connecting line to industries located on their line. For instance, the Alabama Mill & Elevator Company being located on the L. & N. R. R., and not on the Southern Railway, the Southern Railway Co. would pay the L. & N. R. R. Co. $2.00 per car for making delivery to the Alabama Mill & Elevator Co., of shipments that reached Birmingham over the Southern Railway. In this case this charge of $2.00 was borne by the Southern Ry.; no part of it being paid by the shipper or consignee; in other words, it was a deduction from the regular published tariff rate. The contract or

shipping order which was furnished the Southern Railway Co. by Smith-Huggins & Co. and whose conditions were agreed to by them, did not require us to deliver these shipments to any particular point, except our regular delivery tracks. The placing of these cars to the L. & N. and the payment by us to that line of $2.00 per car was an accommodation to the shippers and was in no way compulsory on our part.

At the time this corn moved all the railroads were handling an unusually large amount of business, and, of course, there was other freight of a more perishable nature to be moved, and this freight could only be moved in its turn with relation to other perishable freight. *In view of the situation then existing I do not think these cars could have been moved more promptly than they were.*

(Trans. pp. 105, 106, 107 & 108.)

246 20. That the freight collected from Smith-Huggins & Co. by Southern Railway Company was not prorated by it with the Louisville & Nashville Railroad Company, as in the case of connecting carriers, but in order to accommodate shippers Southern Railway Company merely paid the Louisville & Nashville Railroad Company a switching charge of $2.00 per car, and the Louisville & Nashville Railroad Company paid Southern Railway Company $2.00 per car switching charges on all freight transferred by Southern Railway Company for it.

(Trans. p. 110.)

21. That the local switching charge for car load lots from one industry in Birmingham to another industry located on the same railroad is $4.00 per car, and that if Smith-Huggins & Co., or W. C. Davis & Co. or W. J. Dobbs, or anyone in Birmingham had desired the Louisville & Nashville Railroad Company or Southern Railway Company to switch a car load of corn from one point in Birmingham to another the switching charge would have been $4.00 per car.

(Trans. p. 110.)

22. That neither Smith-Huggins & Co. nor any other party, ever tendered the Louisville & Nashville Railroad Company $4.00 per car to switch these shipments of corn.

23. That the interchange switching business between the Louisville & Nashville Railroad and Southern Railway was carried on, as stated by Mr. Pelter, in the following manner:

"In regard to the manner of offering cars to the L. & N. to be switched to industries on their line in Birmingham, we have a printed form used for that purpose called an interroad switching order. This form is composed of four parts. Part one is kept by the Agent of the Southern Railway for his records; part two, which is a notice to the Agent of the L. & N. that we have $2.00 on deposit in our office to its credit; part three, which is a notice to the
247 L. & N. Yardmaster that the car covered by the switching order will be delivered to him; and part four is tacked on the side of the car and shows in addition to car number to whom the shipment is consigned on the L. & N. In fact, all of the parts

of this switching order show car number, initial, contents and to whom consigned. Parts two and three of this order are given to the L. & N. on a form called Abstract by us."
(Trans. p. 111.)

24. That when the Louisville & Nashville Railroad Company did find it possible to switch these cars, and when it agreed to switch them, it moved them promptly, and the $2.00 switching charge was paid by the Southern Railway Company as a matter of accommodation to the shipper on account of its being competitive business.
(Trans. p. 112.)

25. That the terminals and equipment of the Louisville & Nashville Railroad Company at that time were sufficient under ordinary circumstances and conditions.
(See Testimony E. F. Stollenwerck, Tr. pp. 192-3.)

26. That there is no complaint in this cause that the corn was damaged after the Louisville & Nashville Railroad Company finally agreed to switch the cars and that there was no damage in transit while in the hands of the Louisville & Nashville Railroad Company.
(See Testimony of W. V. Moore & M. L. Beeler Tr. pp. 59-84.)

27. That the Louisville & Nashville Railroad Company was never notified of the perishable condition of the corn.
(See Testimony of Huggins, Tr. p. 48.)

28. That the switching charge of $2.00 per car had no application to the switching of a car for a private shipper in the
248 Birmingham Yards of the Louisville & Nashville Railroad Company, but that that was the switching charge between the two roads.
(See Testimony of F. P. Pelter Tr. p. 112.)

29. That even if it was, Smith-Huggins & Co. never tendered Louisville & Nashville Railroad Company the switching charges for the placing of said cars.
(See Trans. page 81.)

30. That the Louisville & Nashville Railroad Company did not discriminate against the Southern Railway Company.
(Trans. page 157.)

31. That the plaintiffs do not claim to have had any contract with the Louisville & Nashville Railroad Company.
(Trans. page 82.)

32. That the Louisville & Nashville Railroad Company did not solicit switching business over its terminals at Birmingham, but that this was merely a private switching arrangement between the different roads at that point.

There is absolutely no proof in the record that it ever solicited any business. It is true that the plaintiffs make this broad assertion in their brief, but it is not supported by the record.

33. That there is no proof in the record that Louisville & Nashville Railroad Company had ever switched any cars of corn for Smith-Huggins & Co. over its terminals in Birmingham.

34. That I. C. car # 12227 did not go into Birmingham over the Southern Railway, but over the Alabama Great Southern Railway, and that the Louisville & Nashville Railroad Company had nothing to do with this car of corn as it was sold to other parties, who unloaded it for their trade.

249 (Trans. page 68.)

35. That Southern car 3688 did not go into Birmingham over Southern Railway, but went in over the Alabama Great Southern Railroad and that the Louisville & Nashville R. R. Co. had nothing to do with this car as it was sold to another party, who unloaded it from the delivery tracks of Southern Railway Company for their trade.

(Trans. page 68.)

36. That Southern car No. 5180 arrived in Birmingham on December 9th and was switched to the private tracks of the Alabama Mill & Elevator Co. the next morning, or December 10th, by Louisville & Nashville Railroad Company, so that there was no delay claimed against Louisville & Nashville Railroad Company on this car.

(Trans. page 68.)

37. That C. & E. I. car # 450 did not go into Birmingham over Southern Railway but over the Alabama Great Southern Railway, and there is no claim of any damage against Louisville & Nashville Railroad Company on this car.

(Trans. page 103.)

It will thus be seen from the proof that there is no claim by Smith-Huggins & Co. against the Louisville & Nashville Railroad Company on the four cars, to-wit: Southern # 5180, Southern # 3688, C. & E. I. # 450 and I. C. # 12227—So that the Louisville & Nashville Railroad Company is only interested in this controversy as to the following cars:

Southern # 32600.
A. G. S. # 9101.
I. D. W. # 17211.
M. K. & T. # 12803.
A. G. S. # 4028.
Southern # 12413.
A. G. S. # 4027.
A. G. S. # 4044.

The total damage claimed on these cars amounts to $633.23.

250 38. We further request that the Court find specially with reference to these cars as follows:

That Southern car #32600 was shipped from Jefferson City on November 12th, and arrived in Birmingham on November 20th, and consignee was notified, but the freight was not paid or the car

ordered until December 5th, 1902, and that it was promptly delivered by Louisville & Nashville Railroad Company on December 6th, 1902, to Alabama Mill & Elevator Co.

(Trans. p. 102.)

That A. G. S. car #9109 was shipped from Rankins, Tenn., on November 13th, 1902, and arrived in Birmingham on November 22nd, 1902, and consignee properly notified, but the freight was not paid or car ordered until December 5th, 1902, and that it was promptly delivered by the Louisville & Nashville Railroad Company on December 6th, 1902, to the Alabama Mill & Elevator Company.

(Trans. p. 102.)

That I. D. W. car #17211 was shipped from New Market on November 14th, 1902, and arrived in Birmingham on November 18th, 1902, and consignees were notified, but the freight was not paid or car ordered until December 5th, 1902, whereupon the Louisville & Nashville Railroad Company promptly delivered it on December 6th, 1902, to Alabama Mill & Elevator Co.

(Trans. p. 102.)

That M. K. & T. car #12803 was shipped from New Market on November 17th, 1902, and arrived in Birmingham over Southern Railway on November 25th, 1902, and consignees notified, but that freight was not paid or car ordered until December 5th, 1902, whereupon it was delivered by Louisville & Nashville Railroad Company on December 6th, 1902, to the Alabama Mill & Elevator Co.

(Trans. p. 103.)

251 That A. G. S. car #4028 was shipped from New Market on November 18th, 1902, and arrived in Birmingham over Southern Railway on November 24th, 1902, and consignees promptly notified, but that freight was not paid or car ordered until December 5th, 1902, whereupon the Louisville & Nashville Railroad Company switched it on December 6th, 1902, to the Alabama Mill & Elevator Co.

(Trans. p. 103.)

That Southern car #12413 was shipped from New Market on November 19th, 1902, and arrived in Birmingham on November 28th, 1902, and consignees notified, but the freight — not paid nor car ordered until December 5th, 1902, whereupon it was delivered by the Louisville & Nashville Railroad Company on December 6th, 1902, to Alabama Mill & Elevator Company.

(Trans. p. 103.)

That A. G. S. car #4027 was shipped from Jefferson City on November 20th, 1902, and arrived at Birmingham on November 28th, 1902, and consignees notified, but the freight was not paid nor car ordered until December 5th, 1902, whereupon it was delivered by the Louisville & Nashville Railroad Company on December 6th, 1902, to Alabama Mill & Elevator Company.

(Trans. p. 103.)

That A. G. S. car #4044 was shipped from New Market on November 21st, 1902, and arrived in Birmingham on November 28th, 1902, and consignees notified, but that the freight was not paid nor car ordered until December 5th, 1902, whereupon it was delivered on December 6th, 1902 by the Louisville & Nashville Railroad Company to the Alabama Mill & Elevator Company.

(Trans. p. 103.)

Wherefore your Petitioners earnestly pray that your Honors will find the facts as hereinbefore set out in addition to the facts already found in this cause, and that based thereon your Honors will
252 grant your petitioners a re-hearing of this cause.

All of which is respectfully submitted.

CORNICK, WRIGHT & FRANTZ,
Att'ys for Appellant, L. & N. R. R. Co.

No. of car.	Place of shipment.	Date of shipment.	Plaintiff's testimony. Date of arrival in Birmingham over Sou. Ry.	Southern's testimony. Date of notice to consignee by Sou. Ry.	Southern's testimony. Date freight paid to Sou. Ry.	Southern's testimony. Date of delivery to connecting line.	To whom delivered.	Plaintiff's testimony. Date delivered.	Loss claimed.	
Sou. 32600	Jefferson City.	11/12/02	11/20/02	11/20/02	12- 5-02	12- 6-02	Ala. M. & E. Co..	12- 5-02	$62.11	
I. C. 12227	Leadvale	11-12-02	11-17-02	.....	.....	.....	.....	11-26-02	89.94	Via A. G. S.
A. G. S. 9101	Rankins	11-13-02	11-22-02	11-22-02	12- 5-02	12- 6-02	Ala. M. & E. Co..	12- 5-02	66.34	
I. D. W. 17211	New Market..	11-14-02	11-18-02	11-18-02	12- 5-02	12- 6-02	" ..	"	84.49	
M. K. & T. 12803	" ..	11-17-02	11-25-02	11-25-02	12- 5-02	12- 6-02	" ..	"	66.36	
A. G. S. 4028	" ..	11-18-02	11-24-02	11-24-02	12- 5-02	12- 6-02	" ..	"	114.43	
Sou. 12413	" ..	11-19-02	12- 2-02	11-28-02	12- 5-02	12- 6-02	" ..	"	25.09	
A. G. S. 4027	Jefferson City.	12-20-02	11-28-02	11-28-02	12- 5-02	12- 6-02	" ..	"	112 84	
" 4044	New Market..	12-21-02	11-28-02	12- 1-02	12- 5-02	12- 6-02	" ..	"	103.32	
C. & E. I. 450	Leadvale	11-22-02	11-25-02	.. ....	.....	.....	....	"	94.29	Via A. G. S.
Sou. 3688	"	11-20-02	11-28-02	.....	.....	.. ....	.....	12- 2-02	46.55	" "
						(A. G. S.)				
Sou. 5180	Rankins	11-27-02	12- 9-02	12- 8-02	12-10-02	12-11-02	H. Chairsell.	12-10-02	82.52	

254 SMITH-HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY CO. ET AL.

Jefferson County. Equity.

Petition for an Additional Finding of Facts and for a Re-hearing.

Response Thereto.

Filed Sept. 29, 1905. J. G. Stuart, D. C.

In this case we are presented with a petition for an additional finding of facts and for a re-hearing.

The petition covers and fills 22 pp. of typewritten matter and asks for 38 special findings of fact, and that we set out the evidence to support the requested findings.

It would take somewhere in the neighborhood of a hundred pages of typewritten opinion or response to set out and answer the several and numerous requests of the petition in the form in which they are presented and as presented.

To avoid an useless repetition of typewritten matter, we here make said petition a part of this response as Exhibit "A," to the end that we may categorically respond to its requests as numbered in it.

To the 1, 2, 3, 4, and 6th requests we say yes and find as requested, leaving out the mass of evidence cited which we decline to find and report as facts.

We make this response with the qualifications and modification, that the "facts" stated in them are to be taken and construed in their connection with the ultimate statement of facts found and set out in our opinion heretofore filed.

255 The 5th request is granted, with the statement that the Southern Railway was informed of the quality or condition of the corn, and of the necessity or need of its prompt transportation.

The 7th request is granted with the qualification, that complainants knew nothing of the embargo, so called, of the Louisville & Nashville R. R. Co. until one of its members or representatives arrived in Birmingham.

The 8th request is granted, and so is the 9th.

The 10th request is granted, but we must be permitted to say, that we do not see its relevency and bearing on the determinative question in the case as we view it.

The 11th request is granted, but the Louisville & Nashville R. R. Co. would not take the corn from the Southern Railway.

The 12th request is granted, but the L. & N. R. R. Co. would not receive the corn, until the day stated in the request.

We answer *"yes"* under the 13th request, but say that to dray the corn was not only inconvenient and a slow process, but was more expensive than the usual way of its delivery.

We answer yes as to the 14th request.

We decline the 15th request and to set out the evidence requested and the *embargo* notice of the L. & N. R. R. Co.

The simple fact in connection with this matter is that the Louisville & Nashville R. R. Company declined to receive these cars of corn and deliver them to their destination on their spur or side tracks, because it deemed it to its advantage to use its said tracks for and in its own special business.

The 16th request is granted, and so also is the 17th, but the injury was already in proce*dd* of accomplishing its end with respect to the corn when Mr. Moore arrived in Birmingham.

The 18th request is refused in the shape and form in which
256 it is presented.

We decline the 19th request, and to set out the more than two pages of evidence therein contained.

We are not required to set out isolated parts of the evidence in records before us.

We grant the 20th request, with the observation that the central fact involved in it will be found, as we think, in our opinion heretofore filed.

The 21st request, while stating the fact, does not in our opinion state the fact relative to the charges and issues in this case.

The 22nd request is granted, but in our opinion has no relevant bearing on the main issue in this case and the issue and legal ground upon which we decided it.

The 23rd request is granted.

The 24th request as presented is denied and declined.

The 25th request is granted, with the statement that in our opinion, based upon the evidence as we construe it, the L. & N. R. R. Co. could have handled this corn and delivered it to its destination much sooner than it did had it not preferred other business, and even with that business, with the energetic appliance of all the means and facilities at its command.

The 26th, 27th and 28th requests are granted.

The 29th is granted, with the statement that complainants were under no obligation to tender the Louisville & Nashville the switching charges therein mentioned.

The 30th request is granted, with the qualification that the L. & N. R. R. Co. refused to take and switch these cars of corn, or most of them, when tendered by the Southern Railway.

The 31st was granted and the fact called for by it appears in our opinion heretofore filed.

The 32nd request is declined in the broad and unqualified form in which it is presented.

257 It solicited this switching business as to other Railroads entering Birmingham by its course of business in respect thereto.

The fact called for or the statement made in the 33rd request is so and granted, but under the proof it was an accustomed course of business to switch cars of freight coming in over the Southern Ry. to their consignees or to whomsoever directed on their spur tracks.

The 34th and 35th requests are granted, with the statement that

the cars mentioned did not go into Birmingham over the Southern, because, we presume, of the embargo of the L. & N. before referred to.

The 36th, 37th and 38th requests are granted.

Now, with all the requests stated, granted as herein indicated, our opinion hereinbefore filed is not changed, and for the reason, that, in the report of the Master, the damages reported by him as attributable to the L. & N. R. R. Company ensued because of its delay in switching the cars of corn that arrived at Birmingham over the Southern Ry. and his report, in respect to this concurred in by the Chancellor in legal effect, is supported by material evidence.

This response will be filed to the petition and made a part of the record.

The other Judges concur.

S. F. WILSON, *J.*

258 In the Supreme Court of Tennessee, at Knoxville, September Term, 1905.

SMITH-HUGGINS & COMPANY
vs
SOUTHERN RAILWAY CO. ET AL.

Assignments of Error of the Defendant Louisville & Nashville Railroad Company.

Filed Oct. 17, 1905. Alex. McMillan, Clerk, By J. G. Stuart, D. C.

First.

The Louisville & Nashville Railroad Company assigns as error the action of the Court of Chancery Appeals in refusing to find certain uncontradicted facts when specially requested to so find, which are as follows:—

(*a*) "That the court set out in full from the evidence which is uncontradicted, the conditions which were unusual and exceptional, and which caused the embargo to be laid by the Louisville & Nashville Railroad Company against this switching the conditions being fully set out and stated by Superintendent Starks, Assistant Superintendent Wheeler, and Train-master Stollenwerck as follows:

(This testimony being set out in this Brief at pages 6 to 10 it is not deemed necessary to here copy same.)

(*b*) "That there were other warehouses for grain on the tracks of other railroads in Birmingham, and especially that another firm known as G. H. Davis & Co. had a ware-house on the tracks of the Central of Georgia Railroad and that a part of the cars were switched by the Central of Georgia Railroad to the ware-house of G. H. Davis & Co. (Trans. p. 136.) There was no reason why Smith-Huggins & Co. could not have stored all of the corn immediately after its arrival in Birmingham over the Southern Railway, and after its

refusal by W. C. Davis & Co., in this ware-house on the Central of Georgia Railroad's switching tracks, or in some other ware-
259 house in Birmingham on some other road.

Mr. DOBBS, of W. C. Davis & Co. says:

"The Central of Georgia moved five or seven cars to the G. H. Davis & Co. ware-house for me of this Smith-Huggins & Co. shipment. It was necessary to do this, as by so doing he saved it in a somewhat damaged condition."

Trans., p. 136.

(*c*) "That the Court set out in full from the evidence of the witness, F. P. Pelter, which is uncontradicted, the conditions under which these cars arrived in Birmingham over the Southern Railway, and under which the interchange of switching business was carried on between the two railroads."

(While the evidence of Mr. Pelter is copied into the request it is not deemed necessary to copy same here as it will be found in this brief beginning on page 11, to which we here refer the Court.)

(*d*) "That the terminals and equipment of the Louisville & Nashville Railroad Company at that time were sufficient under ordinary circumstances and conditions.

(See testimony E. F. Stollenwerck, Tr. pp. 192-3.)

Second.

The Court of Chancery Appeals erred in holding this respondent Louisville & Nashville Railroad Company liable for any portion of the alleged damage to these various shipments of corn, because under the facts of this case it was not a connecting carrier and was not bound to handle these shipments and for other reasons hereinafter more specifically set out.

Third.

The Court of Chancery Appeals erred in rendering judgment against this respondent Louisville & Nashville Railroad Company for the sum of $609.42, being sixty per cent. of the alleged damage to these shipments of corn, based upon the concurrent
260 findings of the Master and the Chancellor, which said reference and concurrent finding was had several months after the suit had been dismissed as against this respondent Louisville & Nashville Railroad Company, said dismissal being unappealed from, to which said reference this respondent was not a party.

Fourth.

The Court of Chancery Appeals erred in taxing respondent Louisville & Nashville Railroad Company with any portion of the costs of the appeal from the decree of the Chancellor of December 31st, 1904, which appeal was directed by defendant Southern Railway Company against the complainants, Smith-Huggins & Company,

and because this respondent is in no wise liable for any of said costs from the date of said decree of the Chancellor until it was again made a party to the proceeding by writ of error August 4th, 1905.

261 Supreme Court of Tennessee, at Knoxville.

MONDAY, *September* 11, 1905.

Supreme Court of Tennessee at Knoxville. Be it remembered that at a regular term of said Court begun and held at the Court room in Knoxville for the Eastern Division of Tennessee on the second Monday of September, 1905, it being the eleventh day of said month. There were present and presiding the Honorable Associate Justices, W. K. McAlister, John S. Wilkes, M. M. Neil and John K. Shields, all duly elected, commissioned and qualified, according to law, to hold said Court, and the Court being open for the transaction of business, the following proceedings were had, to-wit:—

MONDAY, *November 20th*, 1905.

Court met pursuant to adjournment. Present and presiding, the Honorable Chief Justice, W. D. Beard, and Associate Justices, W. K. McAlister, M. M. Neil and John K. Shields.

The minutes of Saturday, November 18th, were read and signed, when the following proceedings were had, to-wit:—

SMITH-HUGGINS & Co.
vs
SOU. RY. CO. and L. & N. R. R. Co.

Affirmed.

Vacated Nov. 27, 1905.

This cause was this day heard by the Court upon the transcript of the record thereof from the Chancery Court of Jefferson County, together with the written findings and opinion of the Court of Chancery Appeals attached thereto, and on consideration of the briefs and assignments of error and argument of counsel for the respective parties; the Court is of opinion that the assignments of defendants are not well taken and same are accordingly overruled, and that the decree of the Court of Chancery Appeals has no error in it and the same is hereby in all things affirmed, and it is accordingly so ordered by this Court.

262 It is therefore ordered and decreed by this Court that complainant, Smith-Huggins & Co. have and recover of defendants Southern Railway Co. and Louisville & Nashville Railroad Company the sum of $609.42 and interest since October 3rd, 1905, making in all the sum of $613.99, together with all the costs of this cause and executions will issue therefor against the defendant L. & N. R. R. Co. for 60% thereof being $368.39 as well as 60% of the

total costs, and against the defendant Southern Railway Co. for 40% thereof, being $245.60 as well as 40% of the total costs.

263 Supreme Court of Tennessee, at Knoxville.

SATURDAY, *November 25th*, 1905.

Court met pursuant to adjournment.

Present and presiding, the Honorable Chief Justice, W. D. Beard, and Associate Justices, W. K. McAlister, M. M. Neil and Jno. K. Sheilds.

The minutes of Monday, November the 20th, were read and signed, when the following proceedings were had, to-wit:—

SMITH–HUGGINS & CO.
vs.
SOUTHERN RAILWAY CO. ET AL.

Affirmed.

This cause coming on to be heard before the Honorable the Judges of the Supreme Court of Tennessee, upon the transcript of the record from the Chancery Court of Jefferson County, the opinion and findings of fact of the Court of Chancery Appeals, and the assignment of errors filed to the decree of said Court of Chancery Appeals by the defendant, Louisville & Nashville Railroad Company, and the Reply Brief of the complainants, (the Southern Railway Co. not having prayed any appeal from the decree of said Court), and it appearing to the Court that there is no error in the decree of the Court of Chancery Appeals holding and adjudging that the complainants are entitled to recover of the Louisville & Nashville Railroad Company the sum of $623.73, and sixty per cent. of the costs of the cause then accrued, the said decree is in all things affirmed.

It is therefore ordered, adjudged and decreed that Smith-Huggins & Co. recover of the Louisville & Nashville Railroad Company, the sum of $623.73 with interest from October 3, 1905, in all $626.84, and sixty per cent. of the costs of the Chancery Court and of the Court of Chancery Appeals, and all of the costs of this Court, for which execution will issue.

It is further ordered that the decree entered in this cause November 20th, 1905, and found on Minute Book 1905, page 504
264 be, and the same is hereby vacated, on account of the clerical errors appearing therein, and this decree is entered in lieu of the same.

It is further ordered that the petition filed by the Louisville & Nashville Railroad Company for a re-hearing of this cause be, and the same is hereby dismissed at the cost of the Petitioner.

265 In the Supreme Court of Tennessee, at Knoxville.

No. —.

SMITH-HUGGINS & COMPANY
vs.
SOUTHERN RAILWAY COMPANY ET AL.

Petition of the Louisville & Nashville Railroad Company for Rehearing.

Filed Dec. 1st, 1905. S. E. Cleage, Clerk, By J. N. Mitchell, D. C.

Petitioner respectfully represents unto your Honors that it is agreed that the decree of the Court in the above styled cause is so far as Petitioner was taxed with the sum of $626.84, Six Hundred and Twenty Six Dollars and Eighty Four cents, — for the following reasons, to-wit:

While there are twelve cars of corn in controversy in this case and while the Court of Appeals found as a fact that forty percent of the damage accrued against the Southern Railway by reason of the delay in transit, yet it found as a fact that one of the cars was switched promptly by the Louisville & Nashville Railroad Company after it reached Birmingham while three of the cars did not go into Birmingham over the Southern Railway but went into Birmingham over the Alabama Great Southern Railway.

Court of Chancery Appeals found as a fact that the Louisville & Nashville Railroad Company had nothing to do with three
266 cars of corn and that the total damage on the eight remaining cars in which it is interested amounted to $633.23. This amount represents not only the damage on the eight cars while in transit over the Southern Railway but also the damage by reason of the refusal of the Louisville & Nashville to receive them.

We respectfully submit that the Louisville & Nashville Railroad Company should not be taxed with sixty percent of the damages on the four cars that the Chancery Court of Appeals finds the Louisville & Nashville Railroad Company had nothing to do with.

Sixty per cent. of the damage on eight cars in which the L. & N. was interested would amount to $379.93, which amount we respectfully insist is the proper judgment to be rendered against the Louisville & Nashville Railroad Company.

In view of the fact that a new decree was entered in this case on November 25th, 1905 after the first petition to re-hear was filed in this case the question of amount was not presented to this Court because the decree as already entered adjudged the proper amount against the petitioner Louisville & Nashville Railroad Company, while the present decree of which the petitioner now complains, taxes it with sixty per cent. of the entire damages on four cars that were either promptly switched by it or that it had nothing whatsoever to do with.

We regret exceedingly to consume the Court's time at this late day but we know of no other remedy to which we can resort to correct what appears to us to be purely a clerical error.

Respectfully submitted,

CORNICK, WRIGHT & FRANTZ,
Att'ys for L. & N. R. R. Co.

267 *Certificate.*

STATE OF TENNESSEE:

I, S. E. Cleage, Clerk of the Supreme Court for the Eastern Division of the State of Tennessee, at Knoxville, Tennessee, certify that the foregoing is a full, true and perfect transcript of the record and bill of costs, remaining in my office, in the case of Smith-Huggins & Company *vs.* Southern Railway Company and Louisville & Nashville Railroad Company.

Witness my hand, and the seal of said Court, at office, This January 30, 1906.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE, *Clerk.*
By J. N. MITCHELL,
Deputy Clerk.

268 In the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
SMITH, HUGGINS AND COMPANY, Defendants in Error.

To Smith, Huggins & Company, Defendants in Error in the Above Entitled Suit:

Take notice that we will request the Clerk of the Supreme Court of the United States in printing the record in this cause to omit therefrom the following portions of the record not deemed by the Plaintiff in Error to be material to the consideration of this case and the question raised in the Supreme Court of the United States, to-wit:

Portion of Record to be Omitted.

Testimony of J. B. Huff. Rec. pp. 28 to 33 inc.
Testimony of G. W. Long and exhibits. Rec. pp. 33 to 43 inc.
Testimony of J. L. Huggins. Rec. pp. 44 to 49 inc.
Testimony of M. L. Beeler. Rec. pp. 50 to 60 inc.
Testimony of W. V. Moore and exhibits. Rec. pp. 61 to 95 inc.
Testimony of F. P. Pelton and exhibits. Rec. pp. 96 to 116 inc.
Testimony of J. A. Durham and exhibits. Rec. pp. 117 to 125 inc.
Testimony of W. J. Dobbs. Rec. pp. 126 to 138 inc.
Testimony of C. F. Black. Rec. pp. 153 to 158 inc.
Testimony of C. R. Trousdale. Rec. pp. 160 to 167 inc.
269 Testimony of J. A. McDougal. Rec. pp. 168 to 172½ inc.
Testimony of A. W. Richardson. Rec. pp. 174 to 180 inc.
Indexes Rec. pp. 210 to 212 inc.

We attach hereto a copy of the errors to be relied upon by said Louisville & Nashville Railroad Company in said case and the remainder of the record excluding the foregoing portion constitutes the entire record being material to the Plaintiff in Error in the consideration of said case.

This 27th day of April A. D. 1906.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By CORNICK, WRIGHT & FRANTZ,
Attorneys.

We acknowledge service of the foregoing notice this May 1st 1906.

C. T. RANKIN,
Attorney for Smith, Huggins & Co.

270 *Assignment of Errors to be Relied Upon by Louisville & Nashville Railroad Company.*

First: The Court erred in not giving full force and effect to the Act of Congress governing these interstate shipments and in not abrogating all statutes and decisions in conflict therewith, thereby depriving plaintiff in error of immunities and privileges guaranteed to it by the Constitution of the United States and by the Acts of Congress.

Second: The Court erred in holding that it was a part of Plaintiff-in-error'- business to "switch" cars for other roads in its Birmingham yards because it is in contravention of the Acts of Congress which expressly relieves it from such obligations.

Third: The Court erred in holding that the Louisville & Nashville Railroad Company had become a common carrier of the Southern Railway Company as to its Birmingham yards because it had previously "switched" cars for said Southern Railway Company over its private spur tracks, in that the rights of all parties were fixed and determined by the interstate Commerce Act and the "previous course of dealings between the roads" would not alter or affect its rights under the Statute.

Fourth: The Court erred in holding the plaintiff in error did not have the right to discriminate in its switching service between freight arriving in Birmingham over its own lines and freight arriving over other lines and that it could not prefer its own business because it deemed it to its advantage to use its said tracks
271 in its own special "switching" operations, it not being intended by the Act of Congress to require one carrier to receive traffic from a connecting line to the exclusion of that originating upon its own line.

Fifth: The Court erred in rendering judgment against the Louisville & Nashville Railroad Company for damage for its refusal to "switch" the cars in controversy for the following reasons to-wit:

(A) Because it involved the shipment of loaded cars from one State to another thereby becoming interstate commerce and as such

regulated and controlled by the Interstate Commerce Act of Feb. 4th, 1887 (Supplement to revised Statute, Vol. I, page 529) showing that the decision of the Supreme Court of Tennessee was in contravention of said Act of Congress and deprived it of certain rights and privileges that are given it by said Interstate Commerce Act and because said Act provided against and protects plaintiff in error from an invasion of such rights as it has been deprived of by the said Court in this proceeding, the Act of Congress being constitutional and exclusive and abrogating all laws and decisions in conflict therewith.

(B) Because the effect of said decision is to compel this plaintiff in error to turn over to competing railroads its private switch yards and terminals and to hold it liable in damages to individual shippers for its refusal to do so and because said decision holds plaintiff in error liable in damages for its refusal to make a through routing with the Southern Railway Company as to these interstate shipments and to receive the full loaded car of the Southern Railway Company for the purpose of "switching" them across its yards to a private industry located thereon where the freight depot of this plaintiff in error and the Southern Railway Company are side by side.

(C) Because the decision holds this plaintiff in error liable in damages on account of its alleged discrimination against shippers by preferring freights originating upon its own line and its
272 refusal to "switch" cars for other roads in its Birmingham yards until it had relieved the congestion in its yards caused by handling its own cars which is not the form of discrimination provided against in the Act of Congress regulating interstate Commerce.

(D) Because this decision is repugnant to the Constitution and laws of the United States as well as against a right specially set up and claimed under the National Constitution and laws, the effect of which is to compel it to delay the transportation of interstate Commerce originating on its own line in order to "switch" cars within its own switching limits for other roads thereby causing an unconstitutional hindrance and obstruction of interstate Commerce and interfering with the performance of paramount duties to which it is subjected by the Constitution and laws of the United States.

CORNICK, WRIGHT & FRANTZ,
Attorneys for Plaintiff in Error.

273 [Endorsed:] File No. 20084. Supreme Court U. S. October Term, 1905. Term No. 582. Louisville & Nashville R. R. Co., P. E. *vs.* Smith, Huggins & Co. Assignment of Erros & designation by plaintiff in error of parts of record to be omitted in printing, with notice & acceptance of service. Filed May 3, 1906.

Endorsed on cover: File No. 20,084. Tennessee, supreme court. Term No. 198. Louisville & Nashville Railroad Company, plaintiff in error, *vs.* Smith, Huggins & Company. Filed February 5th, 1906. File No. 20,084.

FILE COPY.

FILED
OCT 1 1906
JAMES H. MCKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 198

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

SMITH, HUGGINS & COMPANY

ASSIGNMENTS OF ERROR AND BRIEF AND ARGUMENT ON BEHALF OF LOUISVILLE & NASHVILLE RAILROAD COMPANY

JAS. B. WRIGHT,
JNO. H. FRANTZ,
Solicitors for Louisville & Nashville Railroad Company

E. E. NEWMAN & CO., KNOXVILLE.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 198.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

SMITH, HUGGINS & COMPANY.

ASSIGNMENTS OF ERROR AND BRIEF AND ARGUMENT ON BEHALF OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

STATEMENT OF THE CASE.

This is a suit involving the question as to whether a Railroad Company engaged in interstate commerce can be required to switch or transfer full loaded cars of a competing road within its yards or terminals where their terminals are side by side and if so whether such obligation would attach at a time when abnormal conditions prevail and when it is impossible to do so and at the same time handle the traffic originating or arriving over its own line, and as to whether it is a discrimination within the meaning of the Act of Congress regulating commerce for one Railroad Company to prefer its own bus-

iness to that of a connecting carrier tendered to it for switching purposes and for switching purposes alone.

The bill was filed originally in the Chancery Court of Jefferson County, Tennessee, against the Southern Railway Company and the Louisville & Nashville Railroad Company charging among other things that the Southern Railway Company had failed to forward and deliver within a reasonable time twelve cars of corn shipped from various East Tennessee points to Birmingham, Alabama, and that the Louisville & Nashville Railroad Company refused to deliver the corn as it was by law bound to do. In its plea the Louisville & Nashville Railroad Company denied that it was bound by law to receive the cars of corn and deliver them. The Chancellor held that there was no liability on the part of the Louisville & Nashville Railroad Company. Judgment was rendered against the Southern Railway Company for the entire amount sued for. The Southern Railway Company prayed a special appeal from the decree of the Chancellor in so far as it was held liable for damage to the corn after its arrival in Birmingham. Smith, Huggins & Co. later filed the record for error against the Louisville & Nashville Railroad Company at the September term, 1905, of the Supreme Court of Tennessee and said Supreme Court of Tennessee referred the record to the Court of Chancery Appeals for its findings of fact. The Court of Chancery Appeals affirmed the judgment of the Chancery Court in holding the Southern Railway Company liable but modified the Chancellor's decree so as to hold the Louisville & Nashville Railroad Company liable for that portion of the damages accruing after the arrival in Birmingham because of its refusal to transfer the loaded cars within its yards and terminals to the Alabama Mill & Elevator Co.'s plant situated thereon. The Southern Railway Company did not prosecute an appeal from the judg-

ment of the Court of Chancery Appeals to the Supreme Court and it is not therefore a necessary party to this proceeding. The defendant Louisville & Nashville Railroad Company, however, did prosecute its appeal to the Supreme Court of Tennessee and that Court adopted the judgment of the Court of Chancery Appeals as its judgment and from its action the Louisville & Nashville Railroad Company is prosecuting this appeal in the nature of a writ of error to this Court.

The facts as found by the Court of Chancery Appeals and as otherwise appear in the record are as follows:

THE FACTS.

The depots and terminals of the Louisville & Nashville Railroad Company and the Southern Railway Company in the City of Birmingham, Alabama, are practically side by side, being about three hundred yards apart and are connected by what is known as a "transfer track" which was the property of the Southern Railway Company, the purpose of this track being to interchange freight between the two roads.

Finding of Facts Nos. 8 and 11 by Court of Chancery Appeals (Transcript, pages 62 and 63.)

For some time prior to November 14th, 1902, the Southern Railway Company and the Louisville & Nashville Railroad Company had what is known as a "switching arrangement" for their mutual convenience between their terminals in Birmingham which was carried on as stated by the agent of the Southern Railway Company in the following manner:

> "In regard to the manner of offering cars to the Louisville & Nashville Railroad Company to be switched to industries on their line in Birmingham we

have a printed form for that purpose called an "inter-road switching order." This form is composed of four parts. Part One which is kept by the Agent of the Southern Railway Company for his record; Part Two which is a notice to the Agent of the Louisville & Nashville Railroad Company that we have Two Dollars on deposit in our office to its credit; Part Three which is a notice to the Louisville & Nashville Railroad Company's yard master that the car covered by the switching order will be delivered to him, and Part Four is tacked onto the side of the car and shows, in addition to the car number, to whom the shipment is consigned on the Louisville & Nashville Railroad. In fact all of the parts of this switching order show car number, initials, contents and to whom consigned. Parts Two and Three of this order are given to the Louisville & Nashville Railroad Company on form called 'abstract' by us."

Finding of Fact No. 23 by Court of Chancery Appeals (Transcript, page 69).

On November 13th, 1902, the Superintendent of the Louisville & Nashville Railroad Company at Birmingham gave notice to all railroads entering Birmingham that beginning on November 14th the Louisville & Nashville Railroad Company would not "switch" for connecting lines in Birmingham until further notice, copy of notice sent to the Superintendent of the Southern Railway Company being as follows:

"Birmingham, Ala., Nov. 13th, 1902.

Mr. M. M. Richy, Supt. Southern Railway Company, City.

Dear Sir: This is to notify you that, taking effect at noon tomorrow, November 14th, we will, until further notice, decline to receive business from you for de-

livery on switching tracks within the switching limits of Birmingham, except perishable freight and package cars for our house. Please instruct your agents accordingly. Yours truly,

B. M. STARKS, Supt."

Finding of Fact No. 23 by Court of Chancery Appeals. (Transcript, page 69.)

In the fall of 1902 Smith, Huggins & Company, grain dealers at Jefferson City, Tennessee, contracted to sell a number of car loads of corn to W. C. Davis & Co., grain brokers, of Birmingham, Ala., who had no established place of business but merely sold the corn as it arrived over the delivery tracks of the Southern Railway Company at Birmingham to various customers in and around Birmingham to whom W. C. Davis & Co. intended to distribute it from the delivery tracks.

Finding of Facts Nos. 1 and 2 by Court of Chancery Appeals. (Transcript, page 60.)

The first car of corn was delivered to the Southern Railway at Rankin, Tennessee, on November 12th, 1902; the second on November 13th, 1902, (the date of the notice of embargo in Birmingham); and the delivery of the remainder to the Southern Railway at various East Tennessee points extended from November 14th, 1902, to November 27th, 1902, so that ten of the cars in controversy were not loaded for shipment in East Tennessee until after the embargo.

Transcript, pages 10, 11 and 12.

The first three car loads of corn of this shipment of twelve arrived in Birmingham over the Southern Railway in a damaged condition on account of having become heated in transit

on the Southern Railway because it had been gathered before maturity and immediately upon the arrival of these three cars over the Southern Railway in a damaged condition W. C. Davis & Co. cancelled its contract with Smith Huggins & Co. for the entire shipment of corn.

Finding of Fact No. 3 by Court of Chancery Appeals. (Transcript, page 61.)

Thereupon Smith, Huggins & Co. sent W. V. Moore, a member of the firm, to Birmingham on November 22nd, 1902, to dispose of the corn and after his arrival in Birmingham, not being able to induce W. C. Davis & Co. to accept the corn because it was daily arriving over the Southern Railway in a damaged condition, Mr. Moore started out to sell the corn as the property of Smith, Huggins & Co., to any purchaser that he might be able to find, selling some of it to one party and some to another, but the greater portion of it to the Alabama Mill & Elevator Company, which is situated about three hundred yards from the Southern Railway depot on a side track constituting a portion of the terminals of the Louisville & Nashville Railroad Company.

Finding of Facts Nos. 6 and 8 by Court of Chancery Appeals. (Transcript, page 62.)

Mr. Moore, representing Smith, Huggins & Co., was notified as soon as he reached Birmingham that it was impossible for the Louisville & Nashville Railroad Company to switch these cars of corn for the Southern Railway Company and he was repeatedly told by clerks in the superintendent's office of the Louisville & Nashville Railroad Company that on account of the congested condition of its yards it could not handle the corn to warehouses or industries upon its own line with any

degree of dispatch and they could not assure him when they could handle the same, and Mr. Moore knew these facts before he sold this corn to the Alabama Mill & Elevator Company, and he made the sale to the Alabama Mill & Elevator Company fully aware of the local conditions at that point and the inability of the Louisville & Nashville Railroad Company to handle the cars.

Finding of Facts Nos. 7 and 12 by Court of Chancery Appeals. (Transcript, pages 62 and 67.)

No part of the corn at the time of its arrival in Birmingham had been sold to the Alabama Mill & Elevator Company nor was it contemplated by Smith, Huggins & Company at the time that Company made its contract with W. C. Davis & Co. that the corn should be delivered to the said W. C. Davis & Co. at the warehouse of the said Alabama Mill & Elevator Company on the terminals of the Louisville & Nashville Railroad Company in Birmingham.

Finding of Fact No. 2 by Court of Chancery Appeals. (Transcript, page 61.)

On the other hand the twelve cars of corn in controversy in this suit were shipped from various East Tennessee points by Smith, Huggins & Company on local Southern Railway bills of lading and consigned to themselves at Birmingham, Alabama, the entire haul being over the lines of the Southern Railway and the contract provided for delivery at no other point in Birmingham than at the depot or delivery tracks of the Southern Railway Company.

Finding of Fact No. 1 by Court of Chancery Appeals. (Transcript, page 60.)

The subsequent sale of the corn to the Alabama Mill & Elevator Company seems to have been merely tentative and conditioned upon the acceptance for transfer by the Louisville & Nashville Railroad Company and in fact the Alabama Mill & Elevator Company did not purchase the corn from Smith, Huggins & Co. until December 6th, 1902, on which date the congestion in the yards of the Louisville & Nashville Railroad Company was removed and the cars were promptly transferred to the warehouse of the Elevator Company.

Finding of Fact No. 12 by Court of Chancery Appeals. (Transcript, page 63.)

On the above date the Louisville & Nashville Railroad "switched" these cars for the Southern Railway Company and the usual switching charge of two dollars per car was paid out of the revenue of the Southern Railway Company so that the freight collected from Smith, Huggins & Company was not prorated by it with the Louisville & Nashville Railroad Company upon a mileage basis as in the case of connecting carriers.

Finding of Fact No. 20 by Court of Chancery Appeals. (Transcript, page 69.)

During the time that the embargo was in effect the Louisville & Nashville Railroad Company did not discriminate against the Southern Railway Company but the embargo applied to all railroads entering Birmingham, and another significant fact is that the Louisville & Nashville Railroad Company had never before that switched any cars of corn for Smith, Huggins & Company over its terminals in Birmingham.

Finding of Facts Nos. 30 and 33 by Court of Chancery Appeals. (Transcript, page 70.)

It is also worthy of note that outside of the inconvenience attached to the same there was no reason why this corn should not have been drayed from the cars on the Southern Railway Company tracks to the warehouse of the Alabama Mill & Elevator Company or to any other warehouse.

Finding of Fact No. 13 by Court of Chancery Appeals. (Transcript, page 63.)

Smith, Huggins & Company do not claim that they had any contract with the Louisville & Nashville Railroad Company, but their claim for damage is based upon the refusal of the Louisville & Nashville Railroad Company to switch the cars of the Southern Railway Company containing their corn over the Louisville & Nashville terminals to the warehouses of the Alabama Mill & Elevator Company.

Finding of Facts Nos. 26 and 21 by Court of Chancery Appeals. (Transcript, page 70.)

The refusal of the Louisville & Nashville Railroad Company to "switch" these cars of corn was not an arbitrary measure on its part but was based upon necessity as it was absolutely impossible for it to "switch" these cars under the conditions existing at that time which are fully set forth in the testimony of Superintendent Starks, Assistant Superintendent Wheeler, and Trainmaster Stollenwerck.

Trans., pp. 29-33, 40-41.

ERRORS RELIED UPON.

FIRST.

The Court erred in not giving full force and effect to the Act of Congress governing these interstate shipments and in not disregarding all other statutes and decisions in conflict therewith and in denying it the rights claimed thereunder.

SECOND.

The Court erred in holding that it was the duty of the Louisville & Nashville Railroad Company to "switch" cars over the yards and terminals tendered to it by the Southern Railway Company and thereby turn over its terminals to a competing road, because it had previously "switched" cars for the said Southern Railway Company over its yards and terminals in Birmingham.

THIRD.

The Court erred in holding that the Louisville & Nashville Railroad Company did not have the right to discriminate in its "switching" service as to freight arriving in Birmingham over its own lines and that it could not prefer its own business to through freight arriving over competing lines because it deemed it to its advantage to use its terminals in its own special switching operations.

FOURTH.

The Court erred in rendering judgment against the Louisville & Nashville Railroad Company because of its refusal to turn over to a competing railroad its private switch yards and terminals where the depots and terminals of the competing

roads are side by side and because of its refusal to make a through routing with the Southern Railway Company for these interstate shipments.

FIFTH.

The Court erred in holding that it was the duty of the Louisville & Nashville Railroad Company to "switch" cars of other roads within its terminals to the exclusion of its own business, the effect of its decision being to cause an obstruction to interstate commerce and an interference with the performance of the paramount duties to which it is subjected by the Constitution and Laws of the United States.

BRIEF AND ARGUMENT.

I.

The Federal question in this case grows out of **Section 3 of the Act of February 4th, 1887, supplement to Revised Statute United States, Vol. 1, page 529**, governing Interstate Commerce which said Act provides as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of

passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

"But this act shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

On account of the fact that the complainant instituted this suit upon the theory that the Southern Railway Company and the Louisville & Nashville Railroad Company were "connecting carriers" as to these shipments and that the cars were shipped on through bills of lading the Louisville & Nashville Railroad Company had no notice that a Federal question would arise in the case, but after the issues were made up, the proof taken and that theory of the case completely disproved and the complainant's bill dismissed by the Chancellor as to the Louisville & Nashville Railroad Company and the record filed in the Supreme Court for error as to the Louisville & Nashville Railroad Company, the complainant shifted its position and under the broad practice of pleading in the State Court was allowed to proceed and procure judgment against the Louisville & Nashville Railroad Company upon the theory that it had discriminated against this shipper by preferring its own business; that it had failed to furnish equal facilities for interchange as to these shipments and that on account of its previous switching arrangements with the Southern Railway Company it had no right to refuse to "switch" the cars over its terminals. It was not until this juncture that the Federal question arose—too late to make an issue of the same in the pleadings or for it to appear elsewhere in the record. The opinion of the Court of Chancery Appeals shows that it was necessarily involved and as a matter of fact there could be no other law applicable.

We submit that the proceedings are sufficiently clear, however, to convince this Court that the Federal question was raised and considered in the Court below.

Transcript, page 9.

In any event this case would fall under the line of decisions which hold that this Court has jurisdiction if it appears to the Court that a Federal question was necessarily involved in the decision of the case, whether or not it appears upon the face of the record.

> "It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion if an adjudication of such question was necessarily involved in the disposition of the case by the State Court."
>
> **Kaukauna Water Power Co. vs. Green Bay N. Canal Co., 142 U. S., page 254.**
>
> **Snell vs. Chicago, 152 U. S., page 191.**

> "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the State Court could not have given judgment without deciding it that will be sufficient to give jurisdiction."
>
> **Powell vs. Brunswick County, 150 U. S., page 433.**
> **Armstrong vs. Athens County, 16 Pet., page 284.**

> "It is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms ipsissimis verbis: but it is sufficient if it appears by clear and necessary intendment that the question must have been raised in order to have induced judgment."
>
> **Crowell vs. Randell, 10 Pet., 368.**

"It is not necessary that the Act of Congress on which the Federal right is based should have been pleaded specially or spread on the record. It is sufficient if the record shows that it must have been misconstrued."

McCullough vs. Virginia, 172 U. S., 118.

"A refusal or failure to consider a Federal question is equivalent to a decision against the Federal rights involved therein."

Des Moines M. & R. Co. vs. Iowa Homestead Co., 123 U. S., page 555.

Erie R. Co. vs. Purdy, 165 U. S., page 148.

"Where a party relies upon an Act of Congress and the questions considered by the Court and upon which the case turned were whether the party had brought himself within the scope of that Act, a Federal question is presented."

San Jose Land & W. Co. vs. San Jose R. Co., 189 U. S., page 177.

"The State Court could not have reached a conclusion adverse to the plaintiffs-in-error without holding either that none of its property had been taken or that it was not entitled to compensation therefor which is equivalent to saying that it had not been deprived of its property without due process of law. Thus was presented a Federal question reviewable in this Court."

Kaukauna Water Power Co. vs. G. B. M. C. Co., 142 U. S., page 254.

"The answer and claim made by Defendant in the State Court that the Act of Congress furnished a complete defense to the action to enforce a state statute raised a Federal question and the overruling of that defense by that Court gives the Supreme Court jurisdiction to review the State judgment."

Missouri K. & T. Co. vs. Haber, 169 U. S., page 613.

We submit with confidence that when the shipments in controversy in this case were made from one state to another they became interstate commerce and as such were controlled by the Act of Congress regulating commerce and the rights of all parties became fixed under the Interstate Commerce Act. That Act defines the right of the shipper to have his freight interchanged beyond the terminus of the initial carrier and the connecting carrier's duty to receive it for interchange from connecting carrier, but the defendant in this case claimed certain immunities under this Interstate Commerce Act which the State Court refused to concede and wholly disregarded the rights of this carrier under the said act in arriving at its decision.

II.

As to the first assignment of error we call the Court's attention to the fact that by the express provision of the statute itself it can not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Central Stock Yards vs. L. & N. R. R. Co., 192 U. S., 565.

Little Rock R. Co. vs. St. L. R. Co., 59 Fed. Rep., 402.

Kentucky Bridge Company vs. Louisville R. Co., 37 Fed. Rep., 567.

Oregon Short Line R. Co. vs. N. P. R. Co., 61 Fed. Rep., 158.

"A carrier is not required to transport traffic in the cars of other companies where it has cars of its own equally available for the purpose."

Oregon Short Line R. Co. vs. N. P. R. Co., 51 Fed. Rep., 465.

Louisville R. Co. vs. St. Louis R. Co., 63 Fed. Rep., 775.

"Neither the commission nor this Court has any authority to require the old road to concede the use of its tracks and terminal facilities in order to accomplish an interchange of traffic, nor can this Court or Commission impose upon the old road the duty of making such interchange at its own expense, over its own tracks with its own engines, in its own yards with its own employees. Such interchange between railroads are arranged by mutual agreement fixing the compensation to be paid for services and for the use of improvements and providing for pro rating the expenses incident to interchange but if the parties themselves can not agree upon the terms this Court can not make an agreement for them under the existing law."

Kentucky & Ind. Brd. Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 571.

III.

Referring to the second assignment of error the lower Court stated in its opinion that it had been the custom of the Louisville & Nashville Railroad Company to switch cars for the Southern Railway over its Birmingham terminals but it also found as a fact that switching business between the two roads was carried on by contract.

Transcript, page 69.

It also found as a fact that the Louisville & Nashville Railroad Company had never switched any cars of corn for Smith, Huggins & Company over its terminals in Birmingham.

Transcript, pages 71 and 76.

It is well settled that custom or usage can not be allowed to make a substantial change in the rights and relations of parties or to subvert the settled rules of law.

Barnard vs. Kellog, 10 Wall., 383.
Allen vs. St. Louis Bank, 120 U. S., page 20.

"Whatever tends to unsettle the law and make it different in different communities leads to mischievous consequences and is against public policy."

Barnard vs. Kellog, 10 Wall., 383.

"What the Company may choose voluntarily to do furnishes no criterion for the measurement of the power of legislation. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. The action of the company upon its own volition purely as a matter of internal administration and in regard to the details of its business which it has the right to change at any moment furnishes no argument for the existence of a power in the legislature to pass a statute in relation to the same business imposing additional burden upon the company."

Lakeshore R. R. Co. vs. Smith, 173 U. S., 684.

It was insisted in the case of Oregon S. L. & N. Ry. Co. vs. Northern Pacific Railway Company (51 Fed. Rep., page 465)

that there was a custom among railways to receive freights from connecting lines and not demand the prepayment of freight and the alleged custom was plead as the foundation of a right, and in response to that Justice Field said:

> "There is no law or custom requiring a railroad company receiving freight from a connecting line to advance or assume the payment of charges thereon for the transportation from its origin to the connecting line."

The word "custom" as used by the Court of Chancery Appeals in the case at issue was not intended to be used in the usual sense of the term. What the Court did mean and what it stated in its additional findings of fact was that, as the Louisville & Nashville Railroad Company had been switching cars for the Southern Railway under a special contract it was its duty to switch these cars in controversy for Smith, Huggins & Company.

Certainly the complainant in this case could not claim any rights growing out of the contractual relations between the Louisville & Nashville Railroad Company and the Southern Railway Company as to their switching arrangements, especially in view of the fact that the Louisville & Nashville Railroad Company had never switched any cars prior to that time for the complainant in this case.

IV.

As to the third assignment of error the Court of Chancery Appeals stated in its opinion that the Louisville & Nashville Railroad Company was liable because it declined to receive these cars and deliver them to their destination on its side track because as stated by the Court "it deemed it to its advantage to use its said tracks for and in its own special business."

"The Interstate Commerce Act does not require the interstate carrier to treat all other connecting carriers in precisely the same manner without reference to its own interests. Some play is given by the Act to self interest.

L. R. & M. R. Co. vs. St. L. & S. W. R. R. Co. (C. C. A.) 63 Fed. Rep., 775.

In making arrangements for the use of its terminals, a common carrier will be governed by considerations of what is best for its own interests.

O. S. L. Rd. vs. Northern Pac. Rd. Co., 51 Fed Rep., 465-475.

V.

As to the fourth assignment of error we beg leave to state that the effect of the lower Court's decision in this case was to compel these connecting carriers to enter into a joint arrangement against their wishes and at a time when it was impossible to do so.

The duty to furnish equal and reasonable facilities for the interchange of traffic with connecting carriers does not require connecting carriers to enter into an arrangement between themselves for joint through transportation and they can not be required to do so. Such arrangements are left solely to the voluntary action of the carriers themselves.

L. R. R. Co. vs. St. L. R. Co., 41 Fed. Rep., 559.

St. Louis Bridge Co. vs. Louisville R. Co., 65 Fed. Rep., 41.

Cincinnati R. Co. vs. I. C. C., 163 U. S., 184.

Central Stock Yards vs. Louisville R. Co. (C. C. A.), 118 Fed. Rep., 113.

Atchison T. & S. F. R. Co. vs. Denver, etc., 110 U. S., 667.

There is a vast distinction between forwarding freight by a connecting carrier, as that expression is ordinarily understood, and, on the other hand, merely turning over freight which has reached its destination to another company to be delivered at a particular point in a city.

Western & A. R. Co. vs. Exposition Cot. Mills, 81 Ga., 522.

G. & I. Ry. Co. vs. T. & N. O. R. R. Co., 56 S. W. Rep., 328.

Central Stock Yards vs. L. & N. R. R. Co., 192 U. S., 565.

In the Central Stock Yards case this Court said:

"We have discussed the case as if the stock yards were side by side. They were not, but they were both points of delivery for cattle having Louisville as their general destination. They both were Louisville stations in effect. It may be that a case could be imagined in which carriage to another station in the same city by another road fairly might be regarded as bona fide further transportation over a connecting road and within the requirements of the Kentucky Constitution. However that may be, we are of the opinion that the Court below was entirely right, so far as appears, in treating this as an ordinary case of stations at substantially the same point of delivery, and, therefore as one to be dealt with as if they were side by side. As the defendant would not be bound to deliver at the Central Stock Yards if they were by the side of its tracks its obligation is no greater because of the intervention of a short piece of track of another railroad. As we have said, delivery would have to be made either by unloading, or by the surrender of the defendant's cars."

Central Stock Yards vs. L. & N. R. R. Co., 192 U. S., page 565.

VI.

As to the fifth assignment of error we beg to call the Court's attention to the fact that the effect of that decision is to compel the Railroad Company to delay the transportation of the interstate commerce originating upon its own lines in order to "switch" cars within its switching limits for other roads thereby causing an obstruction to interstate commerce. If the Louisville & Nashville Railroad Company had no right to prefer the interstate business originating upon its own line to business tendered to it by the Southern Railway or other roads for "switching purposes" then it was necessarily required to delay the interstate commerce originating upon its own lines and perform a "switching service" for other roads in cases where the traffic could have been handled locally by drays and otherwise.

As before stated the effect of this decision was to impose a restriction upon interstate commerce and for that reason is contrary to the letter and spirit of the Act.

In conclusion it might be said that the result of the State Court's decision is that the Louisville & Nashville Railroad Company was held liable in damages to a shipper because it preferred its own business and refused to turn its terminals over to its competitor the Southern Railway Company. The goods were shipped from competitive points. Suppose that the soliciting agent of the Louisville & Nashville Railroad Company had stated to the consignors that it could deliver the corn at a certain elevator upon its switch tracks or terminals in Birmingham, but the consignor gave the business to the Southern Railway Company, knowing that it had no facilities for transferring the corn to the elevator. Would it be right to allow the Southern Railway Company to receive compensation for the entire haul to Birmingham and then compel the Louis-

ville & Nashville Railroad Company to turn over to it its terminals for the purpose of completing the delivery to the specific elevator, receiving therefor the nominal sum of two dollars per car for its switching charge? This is practically what happened in this case. According to the decision of the State Court the Louisville & Nashville Railroad Company is compelled to do by indirection what it is specifically released by the Federal statute from doing.

It is thus easily seen that the transfer business might be carried to such an extent and was in this case carried to such an extent as to become a detriment or obstacle to the operations of this Railroad Company's lines for the purposes for which they were designed.

The State Court was in error in all the foregoing particulars and its judgment should be reversed.

Respectfully submitted,

JAS. B. WRIGHT,
JNO. H. FRANTZ,
Solicitors for L. & N. R. R. Co.

FILE COPY.

Office Supreme Court, U
FILED.
JAN 14 1907
JAMES H. McKENN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 198

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

SMITH, HUGGINS & COMPANY.

BRIEF ON BEHALF OF LOUISVILLE & NASHVILLE RAILROAD COMPANY, RESISTING MOTION TO DISMISS.

JAS. B. WRIGHT,
JNO. H. FRANTZ,
Solicitors for Louisville & Nashville Railroad Company

S. B. NEWMAN & CO., KNOXVILLE.

IN THE SUPREME COURT OF THE UNITED STATES.

(October Term, 1906.)

No. 198.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

SMITH, HUGGINS & COMPANY.

REPLY OF LOUISVILLE & NASHVILLE RAILROAD COMPANY UPON MOTION TO DISMISS.

POINT 1. JURISDICTION.

The Federal question in this case grows out of *Section 3 of the Act of February 4th*, 1887, *supplement to Revised Statute United States, Vol.* 1, *page* 529, governing Interstate Commerce which said Act provides as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular description of traffic, to any undue or unreasonable

prejudice or disadvantage in any respect whatsoever. Every common carrier, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

"But this Act shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The brief heretofore filed in this cause going to its merits contains a full statement of the case and various authorities relied upon by the Louisville & Nashville Railroad Company in support of its position. In that brief we have also discussed the question of this Court's jurisdiction and cited authorities in support thereof. In opposition to this motion we rely upon our original brief but desire to supplement the authorities therein cited by additional citations.

As stated in the original brief on account of the fact that the complainant instituted this suit upon the theory that the Southern Railway Company and Louisville & Nashville Railroad Company were "connecting carriers" as to these shipments and that the cars were shipped on through bills of lading the Louisville & Nashville Railroad Company had no notice that a Federal question would arise in the case, but after the issues were made up, the proof taken and that theory of the case completely disproved and the complainant's bill dismissed by the

Chancellor as to the Louisville & Nashville Railroad Company and the record filed in the Supreme Court for error as to the Louisville & Nashville Railroad Company, the complainant shifted its position and under the broad practice of pleading in the State Court was allowed to proceed and procure judgment against the Louisville & Nashville Railroad Company upon the theory that it had discriminated against this shipper by preferring its own business; that it had failed to furnish equal facilities for interchange as to these shipments and that on account of its previous switching arrangements with the Southern Railway Company it had no right to refuse to "switch" the cars over its terminals.

When the case was appealed from the Chancery Court of Jefferson County, Tennessee, to the Supreme Court of Tennessee by writ of error, the Supreme Court of Tennessee referred the record to the Court of Chancery Appeals in order that that Court might pass upon the facts. The Supreme Court of Tennessee failed to file a written opinion as a part of the record so that we must be content in this case with the opinion of the Court of Chancery Appeals, which shows that a Federal question was necessarily involved and that there could have been no other law applicable.

Complainants' bill in this case charges that the goods were delivered to the Southern Railway Company at various East Tennessee points and consigned to Birmingham, Alabama, which allegations in themselves make the subject matter of this lawsuit a subject of interstate commerce.

Transcript, page 11.

Complainant's bill further charges that the goods were delivered to the Southern Railway Company as initial carrier and that the defendant Louisville & Nashville Railroad Company being the connecting and ultimate carrier and as such carrier was bound by said contracts made by the Southern Railway Company and the law relative to common carriers to receive said several cars of corn, forward and deliver them to destination whereunto consigned in good order and in reasonable time.

Transcript, page 12.

Complainants further allege in their bill that "defendants, or one of them, breached the said several contracts aforesaid in that they or one of them wrongfully, negligently and carelessly delayed the delivery of the said several cars of corn for an unreasonable and unnecessary time and failed and refused to carry and deliver said several cars of corn in good order and in reasonable time as contracted and as they were bound to do, etc."

Transcript, page 12.

Anticipating the remote contingency that a Federal question might arise the Louisville & Nashville Railroad Company interposed in response to these allegations the following plea:

> "And touching the allegations made in Section 11 of said bill with relation to this respondent, it is admitted that respondent was and is a common carrier of goods and chattels for hire, in certain states and portions of the country where it operates lines of railroad; but respond-

ent denies the allegations that it was a connecting and ultimate carrier of the car loads of corn alleged to have been delivered to the Southern Railway Company; and denies that it was bound by the alleged contracts of the complainant with the said Southern Railway Company or any of them. *It also denies that it was bound by law to receive said alleged car loads of corn and forward and deliver them to their ultimate destination in good order and reasonable time.*"

Transcript, page 15.

We submit that this general denial sufficiently raised the Federal question even if it should be held necessary to raise it in the pleadings.

We concede that the mere fact that Chief Justice Beard in his certificate referred to a Federal question is not of itself a sufficient compliance with the rules of this Court and that the certificate of the Chief Justice is not a part of the record, but this fact does show conclusively that the question was raised in the lower Court and corroborates our position that a Federal question was necessarily involved in the decision of the case.

This Court has held that although a certificate in itself is not sufficient to confer jurisdiction, still it may have the effect of making more certain and specific what is too general and indefinite in a record.

Parmelee vs. Lawrence, 11 Wall., page 36.

Brown vs. Atwell, 92 U. S., page 327.

Yazoo & M. Valley R. R. Co. vs. Adams, 180 U. S., page 41.

Dibble vs. Bellingham Bay Land Co., 163 U. S., page 63.

The certificate may induce the Supreme Court where the question is a close one not to construe the record so strictly as to hold that it does not sufficiently present a Federal question.

Roby vs. Colhour, 146 U. S., page 153.

The decision in this case was not based upon the statute of any State and as there is no common law right of action for discrimination and as the subject matter of the suit is interstate commerce, the construction of the Act of Congress regulating commerce was necessarily involved in the proper decision of the lawsuit. In the absence of the Act of Congress the complainants would not have had any right of action at all.

Even though the State Court did not in its opinion expressly refer to the Federal Constitution, if the bill of affirmance necessarily denied federal rights claimed by the defendant the writ of error will lie.

Roby vs. Colehour, 146 U. S., page 153.

Green Bay and N. Canal Company vs. Patten Paper Company, 172 U. S., page 58.

The Supreme Court of the United States has jurisdiction in error over a judgment of the Supreme Court of the State when it necessarily involves the decision of the question raised in the appellate court for the first time and noticed in its opinion whether a statute of the State conflicts with the Constitution of the United States.

Arrowsmith vs. Harmoning, 118 U. S., page 19.

Chicago L. Co. vs. Needles, 113 U. S., page 574.

McCullough vs. Virginia, 172 U. S., page 102.

Chapman vs. Crane, 123 U. S., page 540.

Green Bay and N. Canal Co. vs. Patten Paper Co., 172 U. S., page 58.

The Federal question is involved if the effect of the State decision is to construe the Act alleged to violate the federal constitution although the State Court does not mention the statute.

Houston & T. C. R. R. Co. vs. Texas, 177 U. S., page 66.

It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion if an adjudication of such question was necessarily involved in the disposition of the case by the State Court.

Kaukauna Water Power Co. vs. Green Bay N. Canal Co., 142 U. S., page 254.

Snell vs. Chicago, 152 U. S., page 191.

If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the State Court could not have given judgment without deciding it that will be sufficient to give jurisdiction.

Powell vs. Brunswick County, 150 U. S., page 433.

Armstrong vs. Athens County, 16 Pet., page 284.

It is not necessary that the question should appear on the record to have been raised and the decision made

in direct and positive terms *ipsissimis verbis;* but it is sufficient if it appears by clear and necessary intendment that the question must have been raised in order to have induced judgment.

Crowell vs. Randell, 10 Pet., 368.

It is not necessary that the Act of Congress on which the Federal right is based should have been pleaded specially or spread on the record. It is sufficient if the record shows that it must have been misconstrued.

McCullough vs. Virginia, 172 U. S., 118.

A refusal or failure to consider a Federal question is equivalent to a decision against the Federal rights involved therein.

Des Moines M. & R. Co. vs. Iowa Homestead Co., 123 U. S., page 555.

Erie R. Co. vs. Purdy, 185 U. S., page 148.

Where a party relies upon an Act of Congress and the questions considered by the Court and upon which the case turned were whether the party had brought himself within the scope of that Act, a Federal question is presented.

San Jose Land & W. Co. vs. San Jose R. Co., 189 U. S., page 177.

The State Court could not have reached a conclusion adverse to the plaintiffs-in-error without holding either that none of its property had been taken or that it was not entitled to compensation therefor, which is

equivalent to saying that it had not been deprived of its property without due process of law. Thus was presented a Federal question reviewable in this Court.

Kaukauna Water Power Co. vs. G. B. M. C. Co., 142 U. S., page 254.

The answer and claim made by defendant in the State Court that the Act of Congress furnished a complete defense to the action to enforce a state statute raised a Federal question and the overruling of that defense by that Court gives the Supreme Court jurisdiction to review the State judgment.

Missouri K. & T. Co. vs. Haber, 169 U. S., page 613.

In re Lennon, 166 U. S., page 553, this Court used the following language:

"Irrespective of this, however, we think the complainants exhibit a case which arises under the constitution and laws of the United States. The case appears to have been brought solely to enforce a compliance with the provisions of the Interstate Commerce Act of 1887 and to compel the defendant to comply with such Act by offering proper and reasonable facilities for the interchange of traffic with the complainant and enjoining them from refusing to receive from complainants for transportation over their lines any cars which might be tendered them. It has been frequently held by this Court that a case which arises under the constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such laws which the party defendant denies to him and a correct decision of the case depends upon the construction of such laws."

In re Lennon, 166 U. S., page 553.

The latest utterance of this Court upon the subject is found in the case of Chicago, B. & Q. R. Co. vs. Illinois ex rel., Grimwood, in 200 Supreme Court Reports, 50 Law Ed., p. 604, in which the following language is used:

> "I. The first question is one of authority of this court to review the judgment below. As we have seen, the railway company insisted in the court of original jurisdiction that the statute under which the drainage commissioners proceeded could not be applied in this case without compensation and therefore depriving it of property without due process of law, or without denying to it the equal protection of the laws, guaranteed by the Constitution of the United States. The judgment of the trial court was adverse to that view. In the Supreme Court of the State the railway company, by its assignments of error, preserved its objection based on constitutional grounds. That court did not, in words, refer to the Constitution of the United States, and its opinion concluded: 'Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of 40½ of the farm drainage Act." (212 Ill., 120, 72 N. E., 225.)
>
> The contention is that as the State Court based its judgment on the common law duty of the railway company, and not expressly on any Federal ground, it can not be said that there was any denial of the Federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to re-examine the final judgment. Rev. Stat., 709, U. S. Comp. Stat. 1901, p. 575.
>
> Undoubtedly, the general rule is that where the judgment of the State Court rests upon an in-

dependent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the State Court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law, which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for the supreme law of the land must always control. Therefore a fail-

ure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court can not refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have re-examined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a Federal right.

For these reasons we are of the opinion that this court has jurisdiction to re-examine the final judgment of the State Court so far as it involved the Federal right or immunity specially set up by the railway company."

POINT 2. ON THE MERITS.

REPLY TO DEFENDANT IN ERROR.

Although, as before stated, we have covered the various features of this case fully in our brief on the merits we shall here briefly refer to a few of the authorities cited in the brief for defendant in error.

We concede that the findings of fact of the Court of Chancery Appeals of Tennessee were conclusive upon the Supreme Court of Tennessee and that this Court will not go behind those findings. At this juncture we wish to call the Court's attention to the fact that the Court

of Appeals at first delivered a very general opinion but upon being petitioned for a further finding of fact set them forth more elaborately.

Transcript, pages 60-77.

It is upon these findings that the plaintiff-in-error, Louisville & Nashville Railroad Company, relies in this proceeding.

The case of Memphis News Publishing Co. vs. Southern Railway, 110 Tenn., page 684, relied upon by defendant in error in no wise supports its position. The theory of that case was that the Railroad Company (a conceded common carrier) was granting to the Commercial Publishing Co. an undue, unreasonable and unlawful preference over the complainant by transporting papers on a regular scheduled train to distant communities and refusing to carry them for the News Publishing Company on the same terms. In the course of the opinion the Court said:

"The train in question is a scheduled one and is advertised to the world as such. An invitation is given to the public to take passage and ship freight on it. So far as the records show it received upon this train merchandise from every other member of the community and refused carriage of papers for the complainant and this refusal is based not upon a lack of carrying capacity but exclusively upon the ground that it has contracted away its duty, in respect to such property as the complainant has tendered, to another party."

The Court further said:

"From the beginning the Railway Company has itself recognized that it was operating this train as a part

of the common carrier service. It was in no sense a specially chartered train with freight and passengers as simply incidentals."

The case of Avinger vs. Railway Co., 13 Am. St. Rep., 716, can have no bearing whatever upon the case at bar. There was no doubt in that case that the Railway Company was acting as a common carrier. The service denied was not a "switching" service but a carrier service.

The case of Peoria & Pekin United Ry. Co. vs. Chicago R. I. & P. Ry. Co., 190 Ill., is not at all in point. The defendant in that case was not an ordinary railroad company but seems to have been a mere terminal or transfer company. The question in that case was not whether the company had the right to refuse the cars or not, but whether the company was liable for the contents of the cars destroyed in its possession when it had received the same and was proceeding to do the transferring for a compensation.

It was conceded that the receiving company in carrying the goods on the car was acting as a common carrier but it was insisted that as to the rolling stock it was not acting as a common carrier. The Court simply held that there was no difference between the relation as to the goods being carried and as to the vehicle belonging to the said company in which the goods were being carried. The question of the right to refuse the car was never considered. It was not refused and there was no desire to refuse it.

In addition to the case heretofore cited in the brief of the Louisville & Nashville Railroad Company we desire to call the Court's attention to the case of G. & I. Ry. Co. vs. T. & N. R. R. Co. (36 S. W. Reporter, 328), in which the Court used the following language:

"The service so demanded and refused was a switching or transfer service and the freights tendered were not routed expressly over any part of appellant's line. The sums tendered for the service were not tendered as payment for freight in the ordinary acceptation of the term but were tendered as the switching charges ordinarily demanded for such service. No way bill was tendered appellants in connection with the freight, but instead the tender was accompanied either by a switch list showing the name and number of the cars, or a transfer sheet. It was not contemplated by those making the tender that appellants should participate pro rata in the charges upon the freight tendered as fixed in the through rate."

"The service demanded was not transportation in any true sense. It did not involve a haul by appellant of such a nature as to entitle appellant to a pro rata of the through rate nor was any such pro rata contemplated by the party demanding service.

It is thus seen that a connecting line must be such as to form a link between two other roads and we think a fair construction of the language should lead to the conclusion that such connection should extend from one point to another in the state. It is believed that switches, sidings, etc., constructed by the railroad companies for the storage of cars or the more convenient handling of their business as carriers are not in a legal sense a part of their line. A connecting carrier has been defined as one of several common carriers over which any particular shipment is to pass and which shall participate in the transportation of such shipment. A mere transfer company employed to haul goods from the terminus of the initial carrier to the

depot of the next succeeding carrier in the same city is not a connecting carrier."

Citing Ry. Co. vs. Young, 25 Nebraska, 651, 41 N. W. Rep., 646.

"The question remains, however, whether appellants having voluntarily performed like switching service for another road thereby subject themselves to the imposition of a like duty as to all roads tendering like business and offering like compensation?

"We think there is a clear distinction between shifting or transfer service and transportation proper. The duty to perform the latter is clearly imposed. We have been able to find neither statute nor decision imposing the former except as a duty incident to transportation which the railroad has been required to perform. The distinction between switching and transportation proper has been discussed in various cases and the distinction upheld."

Citing National Tube Works Co. vs. B. & O. R. R. Co., 8 Atl. Rep., p. 6.

In the case cited the Court said:

"The switching charges when the switching was necessarily performed by a road other than the carrier undertaking to transport the freight are not to be included in the rate charged for transportation but are entirely separate and distinct services."

In that case the distinction was upheld when applied to switching done by the carrier itself, the switching being shown to have been done not as a necessary

incident to the transportation, but for the convenience of the shipper.

Continuing the Texas Court said:

"It is not contended that the switches and yards of appellants were constructed for the purpose demanded or that their charters authorized them to construct mere terminal facilities for another road at Beaumont. Indeed it is easily seen that the transfer business might have been carried to such an extent as to become a detriment or obstacle to the operation of appellant's lines for the purposes for which they were mainly designed. * * * We are of the opinion that the services demanded of appellants could have been performed or not, as they saw fit."

The Court further said:

"The undisputed facts show that they were not connecting carriers and hence that they were not required to perform this service unless they saw fit."

Another case which is particularly applicable is L. & N. R. R. Co. vs. West Coal Company (198 U. S., page 483). This is a case where an individual or rather a private enterprise sued the railroad company for damages for refusing to permit it to use the wharf of the railroad company at Pensacola for the transportation of plaintiff's property. The railroad company denied its right to use its terminals.

In its opinion this Court said:

"We are of the opinion that the wharf was not a public one but that it was a mere facility erected by and belonging to defendant and used by it in connection with that part of its road forming an extension from its regular depot and yards in Pensacola to the wharf for the

purpose of more conveniently permitting the transportation of goods beyond its own line and that the defendant need not share such facility *with the public* or with any carrier other than those it chose for the purpose of effecting such further transportation. *Neither the public* nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire."

In that case this Court further said: "We do not see that the plaintiff had any right to demand that the defendant should carry plaintiff's goods on the rails defendant had laid down to reach the wharf from its depot and yards at Pensacola, the terminus of its road at that city."

"Those rails were only laid for the purpose of reaching the wharfs in order that defendant might carry goods that it had undertaken to forward by itself or by vessels it had arranged with, beyond its line. Very likely it would be bound to carry plaintiff's goods on this part of its rails for the same purpose and on the same terms it did for others, viz.: In order that it might itself or through others it had contracted with, forward the goods beyond its own line. But plaintiff demands more than this. It demands that defendant should carry plaintiff's goods over its rails thus laid in order that plaintiff may itself forward the goods by vessels of its own selection and that defendant shall surrender possession of enough of its wharf to enable plaintiff to do so.

That the defendant had the right to choose its own agencies and grant to them the exclusive privileges of access to its own wharf which it built only for the purpose of continuing the transportation of goods which it had

transported to the end of its line has in effect been decided by this Court.

Citing Atchison Railroad Co. vs. Denver & N. O. R. R. Co., 110 U. S., page 667.

Continuing, this Court said:

"Having the right, as the authorities prove, to decide what agencies it would employ for the purpose of transporting goods beyond its own line and not being bound to enter into any contracts or arrangements with *one person* or carrier because it had so contracted or arranged with another, we think it follows that defendant was not obliged to permit the public to have access to its wharf built for the purposes stated, simply because it granted such permission to those with whom it made arrangements of the kind set forth in the plea."

L. & N. R. R. Co. vs. West Coast Naval Store Company, 198 U. S., pages 495-496 and 497.

As to the right of a railroad company to discriminate to the extent of protecting itself we wish to call the Court's attention to the case of Texas & Pacific Railway vs. I. C. & C. Co., 162 U. S., page 197.

In conclusion we submit to the Court that when the shipments in controversy in this case were made from one state to another they became interstate commerce and as such were controlled by the Act of Congress regulating commerce and the rights of all parties became fixed under the Interstate Commerce Act. That Act defines the right of shippers to handle freight interchanged beyond the terminus of the initial carrier and the connect-

ing carriers' duty to receive it for interchange from the initial carrier and the shipper would have only such rights as were thus given him under this Act.

The Louisville & Nashville Railroad Company claimed that it was not required to "switch" these cars in its Birmingham yards as the effect of it would be to require it to turn over to the Southern Railway Company its terminal facilities.

The lower Court disregarded its right in the premises under said Act and by indirection gave to the complainant below damages for refusing to do what the law expressly provides that it should not be required to do.

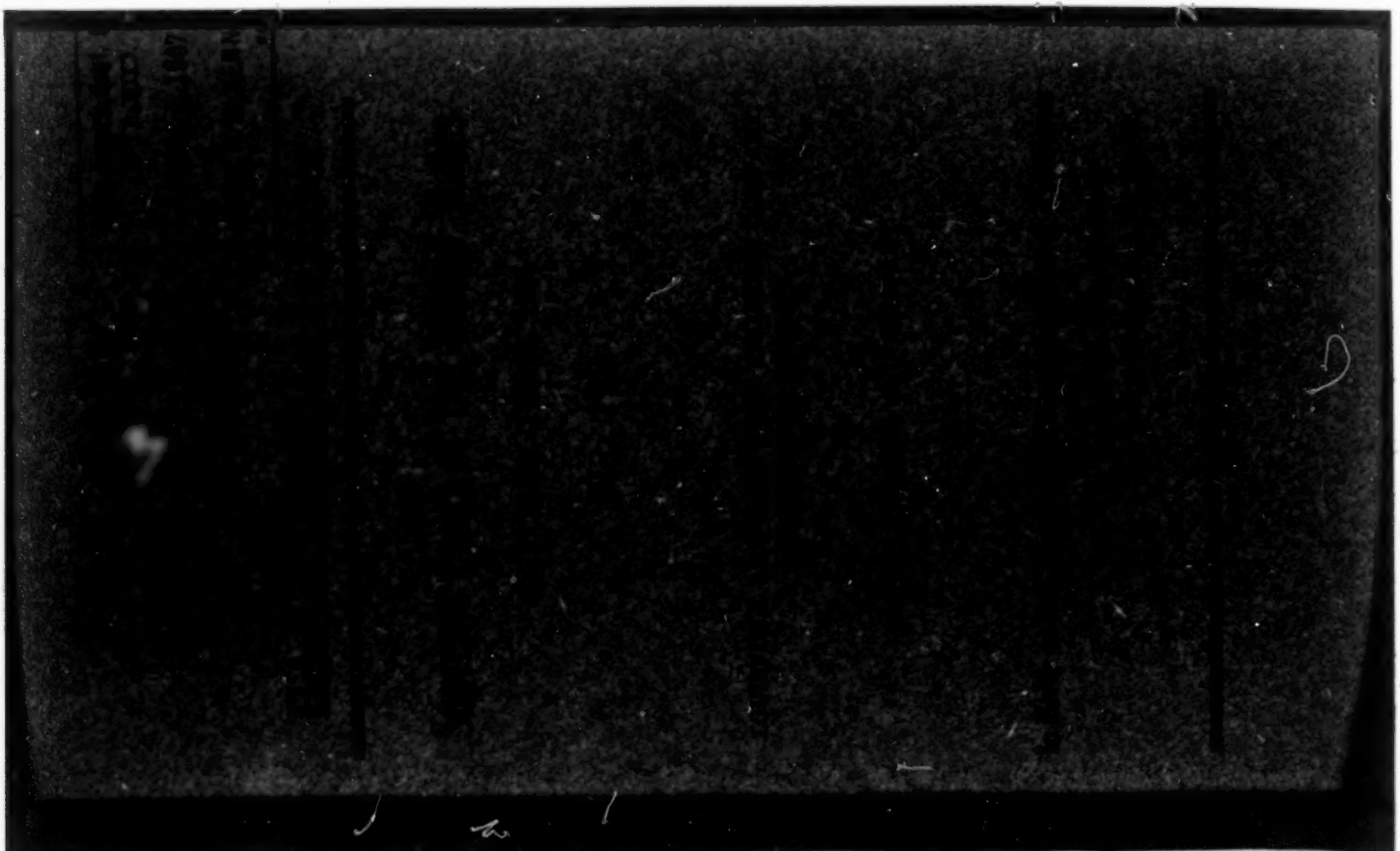
We respectfully insist that the Federal question was necessarily involved in the decision of this case, that it was in fact raised, and that the case was wrongfully decided against this plaintiff in error and should be reversed.

Respectfully submitted,

JAS. B. WRIGHT,

JNO. H. FRANTZ,

Solicitors for Louisville & Nashville Railroad Co.



In the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

SMITH, HUGGINS & COMPANY.

MOTION.

Comes the defendant in error, Smith-Huggins & Co., by its attorneys, and moves the Court to dismiss the writ of error in this cause, and for grounds submits the following:

1. There is no Federal question involved in the decision of this cause by the Supreme Court of Tennessee. There was drawn into question in said courts no statute of the United States; nor any authority exercised thereunder. Nor is the decision of the Tennessee Court in any way repugnant to the constitution, treaties, or laws of the United States. And there is no Federal question involved in said cause which would warrant this Court in reviewing the decisions of the Tennessee Court upon this writ of error.

2. The defendant in error moves to affirm the judgment of the Tennessee Courts, because it is apparent from the record printed and filed in this Court that the grounds alleged for writ of error are frivilous; and that the cause was brought to this Court for delay only.

Defendant in error files herewith its brief, and notice of motion, as required by the rules of this Court.

C. T. RANKIN,

Attorney for Smith, Huggins & Co.

In the Supreme Court of the United States,

October Term, 1906.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *in Error,*

vs.

SMITH, HUGGINS & COMPANY.

In Error to Supreme Court of Tennessee.

BRIEF FOR DEFENDANT IN ERROR, SMITH, HUGGINS & COMPANY.

The defendant in error comes and moves the Court to dismiss this writ of error and affirm the judgment, for the reason that no Federal question is involved; and the decision of the case by the Tennessee Courts contravenes no provision of the Constitution, nor any law of the United States. And because no such question was presented, or passed upon by the State Court.

I.

1. The plaintiff in error prints certain depositions, taken in its own behalf, omitting all opposing proof.

The attention of this Court is called to the fact that the Court of Chancery Appeals has made its finding of facts, which appears in the record.

Op. Court Chy. App., Rec. pp. 53-60.
Response to Pet. for Further Findings, Rec. pp. 75-77.

These findings are conclusive upon the Supreme Court of Tennessee as to the facts of the case; and that Court can not look behind the findings, to the depositions, or any matter of evidence.

Acts 1895, Ch. 76, Sec. 11, creating Court of Chancery Appeals (Shannon's Code, Secs. 6312-6327), provides:

"The findings of fact of said Court of Chancery Appeals shall, in all cases, be reduced to writing, and be conclusive; and the jurisdiction of the Supreme Court shall not extend thereto."

Code (Shan.) Sec. 6322.

Under this statute, the Supreme Court of Tennessee has repeatedly held that the case must be tried by it alone on the findings of the Court of Appeals. And that the decree of the Court of Appeals must be shown by the facts appearing in its findings to be erroneous.

Hale vs. Hale, 99 Tenn., 513.
Carver vs. Maxwell, 110 Tenn., 77.
Woodward vs. Bird, 105 Tenn., 673.

This finding of facts is equally conclusive upon this Court. It is well settled that on writ of error to a State Court, this Court will not review the findings of fact by the State Court.

K. & H. Bridge Co. vs. Illinois, 175 U. S., 626-635. (Law Ed. Book 44, p. 299.)
Jenkins vs. Neff, 186 U. S., 230-238. (Law Ed. Book 46, p. 1140.)

It would have been idle, therefore, for defendant in error to have directed the printing of the omitted depositions in order to show how well supported were the findings of the Tennessee Court by the entire record.

2. This Court will search the record in vain for any suggestion of a Federal question made in the State Courts. Neither the pleadings, decrees, nor findings of the State Courts contain any intimation that such question was suggested there.

It is suggested first in the petition for writ of error

from this Court (Rec. pp. 3-6) and the certificate of Chief Justice Beard thereon. (Rec. p. 9).

It has been repeatedly held by this Court that this is not a sufficient presentation of a Federal question to confer on this Court jurisdiction on writ of error to a State Court.

Hulbert vs. Chicago, 202 U. S., 275. (*Law Ed. Boow 50, p. 1026.*

Parmalee vs. Lawrence, 11 Wall, 36-39. (*Law Ed. Book 20, p. 49.*)

Felix vs. Schamweber, 125 U. S., 54-60. (*Law Ed. Book 31, p. 687.*)

Brown vs. Atwell, 92 U. S., 327-330. (*Law Ed. Book 23, p. 511.*)

Powell vs. Supervisors, 150 U. S., 433-442. (*Law Ed. Book 37, p. 1134.*)

Wabash Rd. Co. vs. Flannigan et al., 192 U. S., 29-38. (*Law Ed. Book 48, p. 328.*)

An examination of the opinion and findings of facts of the Court of Chancery Appeals (Rec. pp. 53-60, 75-77), and its decree (Rec. pp. 52-53), together with the decree of the Supreme Court, which is one of simple affirmance (Rec. p. 80) will show that those Courts did not consider or pass upon any Federal question whatever; and that the Interstate Commerce Act invoked has no application.

Indeed, the certificate of Chief Justice Beard (Rec. p. 9) affirmatively shows that the said Act of Congress did not, in the opinion of that Court, apply or control the shipments.

It is manifest from an examination of the findings and opinion of the Court of Appeals, and the decree of the Supreme Court, that the single question decided, and the ground upon which these Courts based their decision, was *that the Louisville & Nashville Railroad Co., having voluntarily engaged in the business of transferring cars*

from point to point within the city of Birmingham for hire, for whoever applied; and having equipped itself with a net work of spur tracks, and side tracks, extending to the various factories, elevators, and business houses of the city, for the express purpose of carrying on this transfer or switching business, and this work being a regular part of its business, it became, in regard to said transfer business, a common carrier, and could not discriminate in receiving cars offered it for transfer, nor refuse to receive them and move them to points upon its side and spur tracks.

(*Op. Court App. pp. 58-59.*)

It is disclosed by the opinion of the Court of Appeals (Rec. p. 59), that in the State Court the contention of the Louisville & Nashville Railroad Co. was that as to this transfer business, it was a private carrier, and had the right to discriminate in the handling of cars offered it; or to refuse them altogether. The Court of Chancery Appeals find, however, that defendant by its course of business had become a common carrier in transferring such freight, and was bound to move it as speedily as practicable and impartially.

It is found as a fact (Response to Pet. Further Findings, Rec. p. 76) that plaintiff in error declined to receive and deliver these cars to their destination on its spur and side tracks, because it deemed it to its advantage to use said tracks in and for its own special business. That it could have handled this corn and delivered it to its destination much sooner than it did, had it not preferred other business; and even with that business with the energetic appliance of all means and facilities at its command.

It is manifest under the simplest rules of law governing common carriers,

(*a*) That a railroad company may so engage in a

switching, or transfer business in and about a city, as to become a common carrier in respect thereto.

(*b*) That having voluntarily assumed that character, it will not be allowed to discriminate among its patrons, or refuse freight proper to be transferred, and which it is able to transfer.

(*c*) That it must, as such common carrier, receive and move the freight as rapidly as possible by the energetic appliance of the means and facilities at its command.

There is nothing in Section 3 of the Act of Congress, relied upon by plaintiff in error (Pet. Rec. pp. 4-5) which prevents a railroad company from voluntarily engaging in such business of switching, or transfer of freight, and becoming a common carrier in regard thereto.

This Court will look to the opinion and findings of the Court of Appeals for the facts of the case, and to determine whether a Federal question is involved.

The Act creating the Court of Appeals expressly provides that its finding of fact shall become part of the record in the State Supreme Court, and be conclusive upon the Supreme Court.

Code (Shannon), Sec. 6322.

And the decrees of the Court of Chancery Appeals (Rec. p. 52) and of the Supreme Court (Rec. p. 80) expressly show that the opinion and findings of fact were made part of the record.

It is well settled that this Court will look to the opinion and findings of the State Courts, in order to see the ground of decision; especially, where such opinions are made part of the record.

Jacks vs. Helena, 115 U. S., 288. (Law Ed. Book 29, p. 392).

Bank vs. State of Tenn., 163 U. S., 416-426. (Law Ed. Book 41, p. 211).

So, it is respectfully insisted that the writ of error should be dismissed, because no Federal question was involved in, or passed upon by the State Court.

II.

But if the decision of the State Court should be reviewed upon its merits, the case was rightly decided, and should be affirmed by this Court.

It is found by the Court of Chancery Appeals (Op. Rec., pp. 58-59) that the Louisville & Nashville Railroad Co. maintained side, spur, and terminal tracks, in the city of Birmingham reaching various warehouses, elevators, and industrial plants. That it was, and had been for many years, accustomed to receive and remove cars of freight reaching Birmingham, or offered to it by any one, consigned to any of such industries, or plants, for a charge. It had been accustomed to receive all such cars as were tendered it for this purpose.

Pet. Further Findings, Rec. p. 69.
Response, Rec. p. 76.

It was regularly engaged in this switching, or transfer business when the contract for sale and shipment of this corn was entered into. W. C. Davis & Co. bought the corn with this arrangement in view.

Op. Court Chy. App., Rec. p. 58.

This switching, or transferring of cars loaded with freight, or receiving and handling them from point to point upon its terminals within the city, alike for all who offered and paid its charges, was as much a part of its regular business as its general railroad business.

Op. Court Chy. Appeals, Rec. p. 58.

The cars of corn were perishable, and both the Southern and the Louisville & Nashville Railroads had notice

of the necessity for the prompt handling and unloading of them.

Op. Court Chy. Appeals, Rec. p. 58.

Notwithstanding this, the L. & N. Rd. Co. upon the arrival of these cars, refused to receive and place them at their destination upon the spur tracks and terminals, although constantly pressed to do so. It declared an embargo upon the receipt and handling of such cars, after the shipments in controversy were contracted and most of them made. (Op. Court App., Rec. pp. 58-59).

Its reason for refusing to receive and remove these cars to their destination, was because it deemed it to its advantage to use its said tracks for and in its own special business.

Response to Pet., Rec. p. 76.

It could have handled this corn and delivered it to its destination much sooner than it did, had it not preferred other business; and even with that business, with the energetic appliance of all the means and facilities at its command.

Response to Pet., Rec. p. 76.

As a result, the corn stood in the yards, and was so damaged as to become almost an utter loss. The Master and Chancellor concurred in a finding that 60 per cent. of the entire damages to the corn resulted from this refusal of the L. & N. Rd. Co. to receive and handle the cars. and the consequent standing in the yards.

Op. Court Chy. App., Rec. p. 57.
Response to ePt., Rec. p. 77.

This finding is expressly approved, and concurred in by the Court of Chancery Appeals. It was conclusive on the Supreme Court, being a question of fact.

In fact, the concurrent findings of the Master and Chancellor is conclusive on the Appellate Courts when

supported by any material evidence, even in the absence of the statute making the findings of the Court of Chancery Appeals conclusive.

Turley vs. Turley, 85 Tenn., 251.
Wilson vs. Bogle, 95 Tenn., 290.

It is manifest that the sole question considered by the State Courts, as to the Louisville & Nashville Railroad Co. was whether in this business of transferring cars of freight, to and fro upon its system of spur tracks, side tracks, and terminals to and from industries situated thereon, said Railroad Company was acting as a common carrier, or as a private carrier merely.

The Court held that by its method of conducting said transfer business, by doing such transfer or switching business for hire alike for all who desire it; and charging therefor a compensation; by holding itself out as ready to do such transfer work, and soliciting same, it became in respect to it a common carrier; and was, therefore, bound to receive and remove said cars as promptly as possible, and without preference.

This holding of the State Courts rests purely upon the facts shown in the case, and is conclusive as a determination of fact upon this Court.

No statute of the United States was considered. The section of the Interstate Commerce Act relied upon in defendant's petition (Rec. pp. 4 and 5) and assignments of error (Rec. pp. 6-8) is not involved.

III.

So far from requiring the defendant to give the use of its tracks, the terminal facilities to another carrier engaged in like business, it appears that the delivery of these cars by the Southern was complete, when it placed them upon its own delivery tracks in Birmingham. That after their arrival upon the Southern Railway Co.'s deliv-

ery tracks, these cars of corn were re-sold to various elevator companies, and mills upon the spurs and tracks of the Louisville & Nashville Rd. Co., and that the Southern Railway Co. in placing the cars upon the spur track of the Louisville & Nashville Rd. Co. was simply doing so as a matter of favor to the shippers; and without any warrant to charge that it was the shippers tendering the cars to be moved.

Pet. for Further Findings, Req. 1-2, Rec. pp. 60-61.
Req. 8, Rec. p. 62.
Response, Rec. p. 75.

The Southern Railway Co. was not demanding the use of the terminals of the Louisville & Nashville Rd. Co. It was ready and anxious to deliver the cars at all times after their arrival, upon its own sidings.

Pet. for Further Findings, Req. 12-13, Rec. p. 73.
Response, Rec. 75.

See also,
Rec. p. 68.

So, in the last analysis, the only question to be determined is, not a Federal question, but simply whether or not the Louisville & Nashville Rd. Co., as to its transfer business, so held itself out, and conducted the business as to become a common carrier.

LAW.

It can not be doubted that a—Railroad Company which by its character and charter is specially intended to engage in the business of a common carried, may so conduct a transfer business in and about a municipality, as to make itself a common carrier in respect to such business.

In the case at bar, the defendant maintained a sys-

tem of spur tracks and terminals in and around the city of Birmingham, upon which it was accustomed to transfer cars of freight, for all persons offering, without distinction. For these services, it received compensation.

Rec. pp. 58-59.

It held itself out as engaged in such transfer, or switching business, and solicited it by its course of business in respect thereto.

Op. Court of App., pp. 58-59.
Pet. Further Findings, Req. 32, Rec. p. 70.
Response, Rec. p. 76.

There is no possible reason why a Railroad Company may not voluntarily engage in such a transfer business in such a manner. And if it does, the law fixes upon it the character of a common carrier in regard thereto.

This Court has defined a common carries "as one who undertakes for hire, to transport the goods of those who may choose to employ him, from place to place."

Niagra vs. Cordees, 21 Howard, p. 7-35.

The Supreme Court of Tennessee, in the case of *Memphis News Publishing Co. vs. Southern Railway Co.*, 110 Tenn., 684, considers this very question of the distinction between common and private carriers. It is an instructive and well considered discussion of the subject. It is quoted in the opinion of the Court of Appeals in this case. (Rec. p. 59).

The case of *Peoria & Pekin Union Railway Co. vs. Chicago, Rock Island & Pacific Ry. Co.*, 109 Ill., 135, (S. C. 50 Am. Rep., 605, 18 Am. & Eng. Rd. Cases, 506) is a well considered case, and very nearly in point. In that case, the principal business of the defendant was switching cars, for other Railroad Companies, having their terminal points in the city of Peoria. It maintained a system of tracks in the city, reaching mills, elevators, and manu-

factories in and about the city. Other companies desiring to have cars switched by defendant, would place them on its transfer switch, and defendant would transfer them to the consignees, whose places of business were on its tracks. It was held that the defendant Railway Company became a common carrier as to the cars of freight so moved, and liable as such. The course of business of that company seems to have been very similar to the course of business of the Louisville & Nashville Rd. Co. in the case at bar.

Avinger vs. S. C. Ry. Co., 29 S. C., 265, (S. C. 13 Am. St. Rep., 716), is also a case, which well illustrates the principle contended for by complainant in the case at bar. In that case, a private line had been constructed by a Phosphate Company and the defendant railway, for the use of the Phosphate mills. It was held, that the question of whether or not the Railway Company, by its course of business, made itself a common carrier upon this branch line also, was a question of fact for the jury.

There can be no doubt, that the facts found by the Court of Appeals in this cause, makes the Louisville & Nashville Rd. Co. as to its transfer business, a common carrier.

The case at bar is essentially different from the cases of *Central Stock Yards vs. L. & N. Rd. Co.*, 192 U. S., 568, *K. & I. Bridge Co. vs. L. & N. Rd. Co.*, 37 Fed. Rep. —, p. 57, (S. C. 2, L. R. A. 289), and *G. & I. Ry. Co. vs. T. & N. O. Ry. Co.*, 93 Texas, 482 (S. C. 56, S. W. 328) relied upon by defendant.

The first of these, simply holds, that a railway maintaining a live stock depot, as a point of delivery for cattle moved over its lines, consigned to a certain municipality, can not be required to deliver, at a different point, where it may happen to have physical connection with another railroad.

The second case, involves the same question; and the

further question, whether the defendant Bridge Company was such a common carrier, as to require it under the provisions of the Interstate Commerce law, requiring interchange of freights, etc., to receive and interchange traffic with petitioner, at a point of physical connection at 7th Street and Magnolia Avenue in the city of Louisville. It was held that the charter of the Bridge Company did not confer upon it, power or authority to equip its road as a common carrier, or become such. And it was not required to interchange freight at that point.

The Texas case, considers the question, whether a Railway Company would, under the Texas statute, be compelled to receive from one railway, and switch to another, freight not routed, over any of its lines, and consigned to points not upon its lines.

As we understand these cases, they are not even remotely analagous to the questions involved in the case at bar. They are readily accessible to this Court, and are not, therefore, discussed at greater length.

Not one of them, nor any of the cases cited by the defendant, to which we have access, considers the question of a railroad company, which voluntarily engages in transfer and switching business in and about a city; constructing and maintaining a system or net work of spur tracks, side tracks, and terminal tracks for that purpose.. None of them undertake to decide, that the Railway Company engaging in and soliciting such transfer business for hire, and carrying alike for all persons for months and even years, would not, as to such business, become invested with the character of a common carrier, bound to receive and transfer freight over its lines, as speedily as the means at its command would permit, and without preference.

It may be a very intricate question, to what extent one railroad may be compelled against its will, to, receive and switch, or transfer freight for another. The decision of

such a question might depend largely upon local conditions and surrounding circumstances. If it were necessary to do so, complainant might, in this case, concede broadly the doctrine contended for by defendant, that a Railway Company could not be compelled to receive and switch cars over its own tracks, for the benefit of another Railway Company, without in any way impairing, the strength of its case. But such a question does not arise upon this record.

The question we have to consider in this cause is, whether a Railroad Company, by its charter, organized for the purpose of becoming a common carrier, and which has constructed its lines in and about the city of Birmingham, so as to reach the business houses, manufactories, mills, elevators, etc., for the undoubted purpose of engaging in a transfer and switching business for hire; and which has for years been engaged in such business, receiving and transferring freight for all alike, to and from such business houses, manufacturing plants, mills and elevators; and which holds itself out, as engaged in and soliciting such business, becomes in respect thereto, a common carrier. And if it thus becomes a common carrier, can it then refuse to receive and remove perishable freight, of the condition of which, it has notice, as soon as it could remove it, with the energetic use of the means at its command; and whether it has the right to discriminate among its patrons preferring the business of certain of them to the exclusion of others?

Upon these questions there can be no doubt but that the Tennessee Court reached the right conclusion. They are not Federal questions proper for the review of this Court. And it can not be doubted that upon the facts found in this case, this Court reviewing them, must arrive at the same conclusion as the Supreme Court of Tennessee.

If it even appeared, which we insist it does not, that

the business which the L. & N. Rd. Co. *as a common carrier engaged in, in the transfer business* about the city of Birmingham sought to prefer, were shipments which reached the city over the lines of the L. & N. Rd. Co. as a carrier of Interstate freight, or of freight received at other stations upon its lines, yet, we submit that in its transfer business it had no right to prefer it. The L. & N. Rd. Co. as a common carrier, in the transfer business about the city of Birmingham, must handle freight without distinction, as to the road over which it reached the city.

Respectfully submitted,

C. T. RANKIN,

Attorney for Smith, Huggins & Co.

Supreme Court of the United States.

No. 198.—October Term, 1906.

Louisville and Nashville Railroad Company, Plaintiff in Error, *vs.* Smith, Huggins and Company. } In error to the Supreme Court of the State of Tennessee.

[February 25, 1907.]

This suit was brought in the Chancery Court for the county of Jefferson, State of Tennessee, by defendant in error against the plaintiff in error and the Southern Railway Company, for damages alleged to have been received by the defendant in error to certain carloads of corn shipped over the Southern Railway Company from certain points in Tennessee to be delivered to defendant in error or its order at Birmingham, Alabama.

The bill alleged that at the time of the shipments the two railway companies were common carriers of goods and chattels, the Southern Railway being the receiving and initial carrier, and the one with which the contracts were made, and the plaintiff in error being the connecting and ultimate carrier, and as such bound by said contracts and the law relative to common carriers to receive said cars of corn, and to forward and deliver them to destination whereunto consigned in good order and in a reasonable time. It was alleged that one of said companies "breached the said several contracts," whereby the damage complained of accrued.

The companies filed separate answers. That of the Southern Railway Company we need not set out. Plaintiff in error, in its answer, neither admitted nor denied certain of the allegations of the bill, and expressed want of knowledge as to others. Touching the allegation of the bill, that it was a common carrier, it admitted that it was such in certain States and portions of the country where it operated lines of roads, but denied "that it was the connecting and ultimate carrier of the carloads of corn alleged to have been delivered to the Southern Railway Company," denied that it made the contracts or was liable under them, or "that it was bound by law to receive said alleged carloads of corn and forward and deliver them to their ultimate destination in good order and in reasonable time."

The chancellor adjudged that there was no liability on the part of plaintiff in error, and dismissed the bill as to it. He held the Southern Railway Company liable for not delivering the cars, according to its contracts,

within a reasonable time, and, after report by a master to whom the cause was referred, decreed that complainant have and recover the sum of $1,015.69. The case was taken to the Court of Chancery Appeals, both by defendant in error and the Southern Railway Company. And that court adjudged that the court of chancery erred (1) in adjudging that the Southern Railway Company was liable for any part of the damages to the corn which accrued after its arrival upon the delivery tracks of the company in Birmingham and after notice to the consignees of its arrival; (2) in adjudging that plaintiff in error was not liable for the damages suffered by the corn after its arrival in Birmingham and while it was in the yards prior to being unloaded. The court said:

"This court is of the opinion that the Southern Railway Company is only liable for such portion of the damages as accrued by reason of the delay in transition of the cars shipped, which is fixed by the concurrent finding of the master and chancellor at forty per cent of the entire damages.

"This court is further of the opinion and decrees that the Louisville and Nashville Railroad Company is liable for sixty per cent of the damages reported by the master, being the per cent of damages which accrued while the corn remained undelivered in the yards at Birmingham."

It was accordingly adjudged and decreed that the complainant recover of the Southern Railway Company $415.84, and of the Louisvillle and Nashville Railroad Company $609.42, being sixty per cent of the recovery awarded by the chancellor, together with interest from May 8, 1905, making a total of $623.73. The plaintiff in error took an appeal to the Supreme Court of the State. It assigned as error the action of the Court of Chancery Appeals (1) "In refusing to find certain uncontradicted facts when specially requested to so find." The facts were set out. (2) That the court erred in holding the company liable for any portion of the alleged damage "because under the facts of the case it was not a connecting carrier and was not bound to handle these shipments." The other errors assigned we are not concerned with. The decree of the Chancery Court of Appeals was affirmed without an opinion by the Supreme Court. The order of affirmance recites that the cause came "on to be heard upon the transcript of the record from the Chancery Court of Jefferson County, the opinion and findings of fact of the Court of Chancery Appeals and the assignment of errors filed to the decree of said Court of Chancery Appeals by the defendant, Louisville and Nashville Railroad Company, and the reply brief of complainants."

The assignments of error in this court are to the effect that the Supreme Court erred in not giving full force and effect to the Interstate Commerce Act, which, it is contended, governed the shipments, and in not disregarding the statutes and decisions of the State in conflict therewith, and in denying the rights claimed by plaintiff in error under the Interstate Com-

merce Act. And that the court erred in holding that it was the duty of plaintiff in error to switch over its yards and terminals cars tendered to it by the Southern Railway Company; in holding that it did not have the right to discriminate as to freight arriving on its own lines, or could not prefer its own business; in rendering judgment against it because it would not turn over its private switch yards and terminals to a competing road, and because of its refusal to make a through routing with the Southern Railway Company; in holding that it was its duty to switch cars for other roads within its terminals to the exclusion of its own business, the effect being to cause an obstruction to interstate commerce and an interference with the paramount duties to which it was subjected by the Constitution and laws of the United States.

Other facts will appear in the opinion.

Mr. Justice McKenna delivered the opinion of the Court.

A motion is made to dismiss the writ of error, on the ground that no Federal question was raised in the State courts or decided by them. In opposition to the motion plaintiff in error contends that the allegations of the bill and its denial thereof sufficiently raise a Federal question, and that the courts of the State, in rendering judgment against plaintiff in error, necessarily decided that question. And it is further contended that even if those courts did not pass on the Federal question, their failure or refusal to do so is equivalent to a decision against the Federal rights involved. A number of cases are cited to sustain these propositions. But is the basis of the propositions sound? In other words, was a Federal question raised, or, if raised, ignored? First, as to the pleadings. The bill charges a breach of the contracts of shipment by one or the other of the railway companies who, the bill alleges, were connecting common carriers, and as such bound by the contracts and the law relative to common carriers to receive and forward to destination the goods shipped in good order and in a reasonable time. Plaintiff in error admitted that it was a common carrier in some States, but was not a connecting and ultimate carrier of the corn in question, denied that it was bound by the contracts, and denied that "it was bound by law" to receive the corn and forward and deliver it to its ultimate destination. And this denial, it is insisted, raised a Federal question. We do not think so. The denial was of a legal conclusion resulting from the facts alleged, and added nothing to them. Besides, if a party relies upon a Federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement. For this we need not cite cases.

Was a Federal question decided or ignored? To answer the question a review of the proceedings is necessary. The chancery court held that, as between the complainant and plaintiff in error, there was no liability

upon the part of the latter. The rights of the railway companies, between themselves, the court said, need not be determined. The opinion and findings of the Chancery Court of Appeals are very elaborate. They state the issue, the proceedings in and the judgment of the chancery court and recite that—

"Now, it appears that the Louisville and Nashville Railway denies any liability for its refusal to receive corn shipped over the Southern Railway after its arrival at Birmingham and deliver it over its terminal tracks to the American Mill and Elevator Company, to whom the corn had been sold.

"Of course, this denial is predicated upon the idea that it was not a connecting carrier in handling the shipments of corn involved in this case, or that it was under any obligation respecting the same."

Passing on these denials the court said that at the time of the shipments the Southern Railway Company were placing shipments, as they were requested, upon the spur track of plaintiff in error, and that the latter was accustomed to receive them and remove them to places where they were to be delivered; and this was its custom for years, and until about the time or just before the corn reached Birmingham, "it was a part of its business and a daily occurrence to receive and remove such cars of freight." And this was done for all persons offering them and without discrimination. For this service it received compensation. The court, however, also found that plaintiff in error "placed an embargo upon the receipt or handling of such cars, November 13, 1902, after the complainant had contracted to sell the carloads of corn and after most of them were shipped."

The contention of the Louisville and Nashville Railroad Company, the court stated as follows:

"The contention of the Louisville and Nashville Railroad Company, reduced to its simplest statement, is that it was not bound to receive these cars of corn and place them.

"This insistence on its part rests upon the proposition that, in the matter of handling the cars of other roads in its yards or over its spur tracks, it was not a common carrier, but simply a private carrier, and that this being so, it had the right to refuse to receive and handle these cars, and as a corollary to this proposition, that it had the right to discriminate between freight arriving in Birmingham over its lines and freight arriving over other lines, and could give preference between those that it chose to serve in this business."

The court decided against the contention, and that the company, by reason of its practice in handling freight, "assumed with respect thereto the character of a common carrier, and hence incurred the duties and liabilities of such character." The court added:

"The result is that we are of opinion that the Louisville and Nashville Railway Company was bound, by virtue of its previous course of business, to accept these cars of corn and deliver them to their destination on its terminal or spur tracks, and that by reason of its failure to do so, it is liable for all damages resulting from its failure, ..."

There was a petition for an additional finding of fact and a rehearing, which the court said would take in the neighborhood of one hundred pages of typewritten information to set out and answer in the form in which they were presented. Some, however, were granted; some qualified. We give only those which we think are relevant. The fifteenth request was that the court set out in full from the evidence, which was, it was said, uncontradicted, the conditions which caused the embargo to be laid by plaintiff in error against switching. The evidence was set out. The court, answering the request, said:

"The simple fact in connection with this matter is that the Louisville and Nashville Railroad Company declined to receive these cars of corn and deliver them to their destination on their spur or side tracks, because it deemed it to its advantage to use its said tracks for and in its own special business."

The twenty-fifth request was "that the terminals and equipment of the Louisville and Nashville Railroad Company at that time were sufficient under ordinary circumstances and conditions." In granting this request the court remarked:

"The twenty-fifth request is granted, with the statement that in our opinion, based upon the evidence as we construe it, the Louisville and Nashville Railroad Company could have handled this corn and delivered it to its destination much sooner than it did had it not preferred other business, and even with that business, with the energetic appliance of all the means and facilities at its command."

It will be seen from this statement of the case that there is not a word in it which refers to the Interstate Commerce Act or the assertion of any rights under that act. Plaintiff in error accounts for the want of explicit statement on the ground that the action was instituted and tried, until the decision of the chancery court, upon the theory that the Southern Railway Company and plaintiff in error were "connecting carriers," and that this theory of the case having been disproved and the appeal dismissed as to plaintiff in error, complainant (defendant in error) shifted its position, and under the broad practice and pleading in the State court was allowed to proceed and procure judgment upon the theory that plaintiff in error had discriminated against defendant in error by preferring its own business, that it had failed to furnish equal facilities for interchange as to this shipment, and that, on account of its previous switching arrangements with the

Southern Railway Company, it had no right to refuse to "switch" the cars over its terminals. The record furnishes no justification for this contention. The bill charged the railroad companies as being connecting common carriers, plaintiff in error being the ultimate carrier, and that both were bound by the contracts made, and bound to carry the corn from the points of shipment to destination. Plaintiff in error denied these allegations, as we have seen, and on the issue thus formed proof was taken.

The chancery court found, it is true, in favor of plaintiff in error. The case was taken to the Court of Chancery Appeals, where it was heard, the record recites, "upon the transcript of the record from the Chancery Court of Jefferson County and upon the assignments of error and briefs of counsel." In other words, the Court of Chancery Appeals heard the case as made in the chancery court. What the Chancery Court of Appeals said of the issues and contentions of the parties we have already stated, and we need only repeat that the assignment of error by complainant (defendant in error) in the Chancery Court of Appeals was general, and showed no change in the theory upon which the case was brought and conducted. It was that the chancery court erred in holding that there was no liability on the part of the Louisville and Nashville Railroad Company, and in refusing to hold that it was liable either alone or jointly with the other company. And the court said that the denial of plaintiff in error of liability was "predicated upon the idea that it was not a connecting carrier in handling the shipments of corn involved in this case, or that it was under no obligations respecting the same." It is true the court also said that plaintiff in error contended "that it had the right to discriminate between freight arriving in Birmingham over its lines and freight arriving over other lines, and could give preference between those that it chose to serve in this business," but this contention, it was also said, was "as a corollary" to the proposition that plaintiff in error was not a common carrier, but simply a private carrier. The court determined against this proposition, and in consequence adjudged plaintiff in error liable. In other words, the judgment of the court was in exact response to the pleading. Nor was there any change on appeal to the Supreme Court. The railroad company's second assignment of error was (and it is the only one with which we can concern ourselves) that it was not "liable for any portion of the alleged damage to these various shipments, because under the facts of this case it was not a connecting carrier and was not bound to handle these shipments. . . ."

There is in the printed record a certificate of the Chief Justice of the Supreme Court of the State, given when the writ of error was applied for, to the effect that the Supreme Court of the State was of opinion "that the statutes and laws of Tennessee were not in conflict with the act of Con-

gress regulating interstate commerce, and that the act of Congress did not control the shipments in controversy." Counsel concedes the rule to be that the certificate of the presiding judge of a State court is insufficient to give us jurisdiction, but insists that it can make more certain and specific what is too general and indefinite in the record. There is no doubt of the rule, but there is nothing in this record to justify its application. There is nothing in the record to specialize. It is less open to conjecture than the certificate. As no Federal question was raised, the motion to dismiss must be granted.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.